Central Law Journal.

ST. LOUIS, MO., AUGUST 15, 1902.

RIGHT TO RECOVER ON A MORTGAGE WHICH HAS BEEN TRANSFERRED BY THE MORTGAGEE TO, OR EXECUTED IN FAVOR OF, A RESIDENT OF ANOTHER STATE, FOR THE PURPOSE OF EVADING TAXATION.

A most unusual and interesting case is pending before the Indiana appellate court, involving the question of the invalidity of a contract on grounds of public policy in which the intention of either party is to evade the payment of his taxes. In this case both parties to a certain mortgage resided in the state of Indiana. At the suggestion of the mortgagee, however, the mortgage was executed in the name of a resident of Illinois for the admitted purpose of avoiding taxation. The notes and mortgage were then immediately transferred back to the mortgagee, the plaintiff in this suit, who now seeks to recover thereon. The defendant sets up as a defense that the mortgage is void and unenforceable on grounds of public policy, because of the provision enabling plaintiff to evade his taxes.

Public policy or the policy of the law is a term very difficult of accurate definition. What transactions are contrary to public policy? Originally a distinction was made between acts *mala prohibitum* and *mala in se*, which has long since been exploded. So also a contract merely to deceive the public will now be invalidated on grounds of public policy. Thus in the recent case of Church v. Proctor, 66 Fed. Rep. 240, the court, through Justice Aldrich, announces the general rule as follows: "The wholesome and salutary maxim, '*ex turpi causa non oritur actio*,' has been so far enlarged that it may now be said that the law will not afford a remedy to a wrongdoer in a scheme to deceive and defraud the public, and this modern doctrine does not depend upon the consideration, or the innocence, or lack of innocence, of the party who seeks to interpose the objection." And Smith's Law of Contracts goes still further and says: "It must be observed that a contract, although not expressly prohibited by a statute, may be illegal if opposed to the general policy and intent thereof; so also *a contract made in order to enable another to infringe that policy and intent*. See also Dial v. Hair, 18 Ala. 798, and Drexler v. Tyrrell, 15 Nev. 114, as sustaining this statement of the law.

Whether an attempt to evade the payment of taxes is contrary to the policy of the law is a question too plain to be debatable. It may be that the constant and deliberate evasion of taxation which is so generally practiced in this country may have dulled the consciences of the people to its terrible heinousness, but that does not make it any the less a practice absolutely opposed to the policy of the law; nor does it make it any less the duty of the courts to rebuke it and to discountenance it as they would treason. Justice Sharswood, whose clearness of vision and freedom from extravagant statement were well recognized, expresses himself on this question as follows: "He who saves a sum of money by evading the payment of a tax does exactly the same injury to society as he who steals so much from the public treasury, and is therefore guilty of as great immorality, or as great an act of dishonesty." (1 Shars. Bl. Comm. p. 58, note.) The evasion of taxation is therefore contrary to public policy. True, such evasion has not been made a crime, nor has it been expressly prohibited. We have already found, however, that an act or contract to be contrary to public policy does not have to be expressly prohibited. Any contract which is in direct violation of the law or any contract or any provision therein which is entered into for the purpose of enabling either of the parties thereto to violate the law is void, and contrary to public policy. This general conclusion which we believe to be firmly substantiated by reason and authority offers to our mind an easy solution of the particular question before us. Where, therefore, a contract of mortgage, which evidences a loan from one party to another, both residents of the same state, is executed in favor of a non-resident merely for the purpose of enabling the real mortgagee to evade the payment of his taxes on the mortgage, such contract is absolutely illegal and void on grounds of public policy, and cannot be enforced either by foreclosure or otherwise against the mortgagor.

There are many authorities involving the illegality of contracts on grounds of public policy which, while not identical with the ques-

tion now before us, offer many valuable suggestions toward its proper solution and show the strong tendency of the courts to nullify contracts on evidence of the merest tendency in them to violate what may fairly be considered the sound policy of the law. These cases may be found in any encyclopædia or text-book of the law under the subject-headings of public policy or illegality of contracts. But cases on the exact question before us, are, strange to say, very few. There are two comparatively recent cases, however, which clearly and unequivocally sustain the conclusion which we have just announced. Dexter v. Tyrrell, 15 Nev. 114; Sheldon v. Preussner, 52 Kan. 579, 35 Pac. Rep. 201.

The first and leading case on this question is that of Dexter v. Tyrrell, 15 Nev. 114, an action to foreclose a mortgage. In this case the defendant borrowed ten thousand dollars of plaintiff on a note and mortgage which the latter requested to be executed in favor of a resident of California, for the sole purpose of preventing an assessment and of evading the payment of taxes thereon in the state of Nevada, where both plaintiff and defendant resided. Subsequently the notes and mortgage were transferred back to plaintiff who, when they became due and unpaid, brought this action of foreclosure. The court denied the plaintiff's right to forclose the mortgage, holding the latter instrument to be absolutely void and unenforceable on grounds of public policy, because of the provision enabling the plaintiff to evade his taxes. The opinion in this case is very exhaustively and carefully reasoned and is undoubtedly one of the masterpieces of American case law. Justice Leonard, speaking for the court, said, in part: "Any contract, arrangement, or device, entered into for the sole purpose of placing property otherwise taxable beyond the operation of the revenue laws, is distinctly opposed to the policy of that law. And if there is one statute more than another, of the policy of which courts should not countenance an evasion, that one is the revenue law. Upon its proper and legal enforcement the life and prosperity of the state depend; and if one citizen escapes payment of a just portion of taxes, the burden he should bear must fall upon others who are already heavy laden. * * * A contract may be illegal because the consideration was such, or the act to be performed is of that character; and it is said, that this mortgage is valid, because 'it was based upon a lawful consideration, and no principle of public policy or good morals prohibited its creation.' That it would have been legal had it been taken in plaintiff's name, there can be no doubt; but when it was executed for the purpose of contravening the revenue law, by obtaining the full benefit of the loan in this state, without bearing burdens legally imposed upon him and other citizens alike, it became illegal. To say otherwise, would be to affirm a contract entered solely for an avowed illegal purpose. The state did not establish judicial tribunals for the purpose of legalizing acts, the object and result of which are her destruction."

The other case, applying the rule even further and apparently more harshly than the case first noted is that of Sheldon v. Pruessner, 52 Kan. 579, 35 Pac. Rep. 201. In this case a mortgagee, residing in the state of Kansas, owned and had in his possession a note for $1700, secured by a mortgage upon real estate in that state, and pretended to transfer, by merely indorsing his name thereon, but without actually delivering the same, such note and mortgage, to his father in another state for the purpose of evading the payment of taxes justly due the state. In an action brought in the name of the father to recover upon the note and mortgage, the court held that the mortgagee, on account of his acts in evading the payment of taxes and thereby defrauding the revenues of the state could not have any recovery in the name of his father or otherwise on any part of the note or mortgage belonging to him. The court said: "If Simon Pruessner [the father of the mortgagee] is a *bona fide* owner and holder of the note and mortgage, we think he may be permitted to recover; but if Henry [the mortgagee] transferred the note and mortgage to evade the paying of taxes on his interest therein, he cannot be permitted to recover any part of the note and mortgage for his benefit. If the note and mortgage had been transferred in good faith as a gift, sale, or as collateral security, without any wrongful intent or purpose to defraud the revenue laws of the state, the whole amount thereof might be recovered by any owner or holder of the same. But the evidence appearing in the record, unexplained, prevents in this case the

rendition of a judgment upon the note and mortgage."

We nave already expressed our surprise that such cases have not been more frequent. This method of evading taxation is certainly quite general. It may be, however, because such a defense is, at least as between man and man, apparently quite unfair and dishonorable. But as between a defendant in such a case and the state, we believe that the former is under obligations to set it up. A man's duty to the state is higher than his duty to his fellow-man and demands the utmost fidelity on his part. A man who sees another robbing the state treasury by evading his taxes should at least not aid him in consummating his treasonable purpose by failing to interpose any legal obstacle which it may be in his power to set up against him. And the courts themselves should be fearless in stamping out a practice which is at once so deplorable in its effect upon the morals of the community and at the same time so destructive to the very existence of government.

NOTES OF IMPORTANT DECISIONS.

BANKRUPTCY—FAILURE TO LIST IN SCHEDULE OF DEBTS A SUM OF MONEY ADVANCED TO A MINOR CHILD. — An esteemed correspondent from the state of Washington sends us an advanced copy of the opinion of United States District Judge Hanford in the very recent case of *In re* Jeremiah Schenck, Bankrupt. One of the interesting points in this case is the refusal of the court to grant the bankrupt a discharge because of his failure to list a debt due him from a minor child. Within a period of less than one year from the date of filing his petition Mr. Schenck advanced $750 to his youngest son to enable him to go to Alaska and procure an outfit for engaging in mining operations in that country, which was to be repaid to him if the young man met with success in his venture. The court said: "Although Mr. Schenck expected the amount advanced to be a loss if the venture proved to be a failure, it was nevertheless a debt legally due to him, and it should have been listed in his schedule of assets, but was omitted." On a rehearing the court further said on this question: "This loan was made to the son four months before he became of age. The bankrupt was examined between six and seven months after the son became of age, and there was no testimony that the son had ever repudiated the transaction."

RIGHT OF PRIVACY AND EQUITY RELIEF.

General development of the law in the past century shows no more progress in any branch than in that relating to the privacy of the person as distinct from the same term when used in a property sense.

Beginning with the common-law recognition of the right to enjoy one's holding in the soil without let or hindrance at a time when a man's place of abode was his castle and his privacy therein sacred as against all ordinary interruption, down through the gradual extension of the property idea to all sorts of personalty, there has come a gradual development of the idea that courts may intervene to protect persons in the enjoyment of rights, not strictly property in one sense, but closely allied thereto. The right of privacy in the enjoyment of real property has never been questioned, at least never under established government. But under the common law there was no remedy for the violation of one's privacy, there being no sense of damage from mere mental distress. Now courts throughout this country recognize mental anguish as an element of damage.

This right of privacy, as we now understand it, was first recognized in the matter of private letters, and was based upon the assumption of a property interest in them. Then the courts of chancery enjoined the unauthorized use of names and the more intangible personal rights became the subject of equitable jurisdiction. The growth of equity jurisdiction is what brought relief in these cases. Conservative to the last, the rule of the common law would not permit relief. Equity, however, the progressive part of the law, moves towards ethical perfection.

The proposition that equity will protect rights other than those of property is a distinct advance in equitable doctrine, and proves the progressiveness of this side of the law. If the law is not always right, equity is. It should be stated here, in this connection, that although courts, and particularly the New York courts, have shown an intention to be very liberal in extending the gracious indulgence of equity over wounded feelings and sensitiveness, there is, all the time, the assertion underlying the granting this relief that is based upon the assumption of a property right, however remote. The idea has been extended merely and is not absolute. The court broke away from the common-law doctrine in Lee v. Pritchard,[1] holding that relief might be

[1] 2 Swanston, 402.

granted in a case where the right involved was not strictly of a property character. This right was also recognized in the case of Prince Albert v. Strange,[2] where the theory that an injunction could not be granted unless an action for damages would lie was repudiated.

Apparently, it was not until the year 1889 that the English courts could abandon the old idea that relief in these cases could only be predicated on the violation, or intended violation, of a strictly property right, and adopt the more progressive idea indicated in the opinion of the court in the case of Pollard v. Photographic Co.[3] It was there held that the right to grant an injunction does not depend in any manner upon the actual existence of the property interest. That the court of chancery had always an original and independent jurisdiction over what the court considered and treated as a wrong, whether arising from a violation of unquestioned right, or from a breach of contract or violation of confidence. In New York the case of Manola v. Stevens in 1890 attracted great attention and was reported in the *New York Times* in the month of June. No contest being made the case was never officially reported. A noted actress sought to restrain the publication of a picture of herself taken surreptitiously while she was performing her role upon the stage. In cases involving this feature of public character the courts are inclined to make distinctions. Some people by reason of occupation or relation may be said to belong to the public, and this characteristic would tend to defeat the claim of right of privacy. In 1892 came before the first division of the Supreme Court of New York the case of Schuyler v. Curtis,[4] involving the issue of a preliminary injunction by the district court in a case where a society proposed to place a life size statue of a woman to be designated "The Typical Philanthropist" upon exhibition at the World's Fair in Chicago. The relatives of the woman interferred and applied to the court for a restraining order against the society. This was granted and an elaborate opinion was filed declaring the right of persons to be protected in the enjoyment of their privacy. This case was then removed to the appellate division of the court, which, in 1895, rendered a decision reversing the decree of the lower court, Mr. Justice Gray dissenting.

In the meantime there had come before the Supreme Court of Massachusetts and New York two cases where the relief sought was of the same nature. Marks v. Jaffa[5] was decided upon the authority of the opinion of the same court in Schuyler v. Curtis, *supra*. This case involved the publication in a newspaper, by the editor, of the pictures of two actors with an invitation to the patrons of the paper to vote, with a view of determining who was the more popular of the two. The actors declined to give their consent to this proceeding, and a bill was filed complaining of the intended violation of privacy, and praying for an order to restrain such action. The order was granted. The other case was that of Corliss v. Walker.[6] A bill of complaint was filed in the federal circuit court of Massachusetts by the widow and children of Mr. Corliss, the celebrated builder of the Corliss engine, exhibited at the Philadelphia exposition of 1876, to restrain the publication of an unauthorized biography and picture of himself. Here the question of the right of equity to interfere by injunction to restrain a violation of the right of privacy was distinctly raised, and the decision of the court in the Schuyler case in New York was not followed. In the first hearing of this Massachusetts case the court separated the grounds of complaint into that which claimed relief against the publication of the biography, and that claiming relief against publication of the picture. On the authority of the constitutional stipulation for freedom of the press, and the right to freely utter and publish whatever the citizen pleases, which is neither libelous of individuals nor contray to public morals, relief was denied to complainants for the publication of the biography. But as to the publication of the picture the court said: "This matter concerns directly the exclusive right of property which the complainants have in the painting and photograph, and it would be a violation of confidence or a breach of contract between the parties to permit the defendant, under these circumstances, to use either of the plates." In this Massachusetts case there had been an agreement with the publishers which complainants claimed was being violated, hence the reference to a breach of contract in the above

[2] 1 Mane. & G. 25.
[3] 40 Ch. Div. 354.
[4] 147 N. Y. 434.
[5] 26 N. Y. Sup. 908.
[6] 57 Fed. Rep. 434.

extract. Mr. Justice Colt in the same case later said: "Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well a personal right, and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by his clerk." Other authorities sustain this statement of the law.[7] In the Corliss case the court, referring to the matter of publication of pictures, suggests plainly the distinction between the public and private character of the person concerned, and says: "A private individual should be protected against the publication of any portraiture of himself, but in the case of the public character of an individual the case is different. A statesman, author, artist or inventor who asks for and desires public recognition may be said to have surrendered this right to the public."

So that when any one obtains the picture of any well known public character and desires to publish the same, if there is no breach of contract relation involved, and no violation of confidence in so doing, the same may be published in any legitimate manner. The Supreme Court of Michigan in Atkinson v. Doherty[8] does not agree with the reasoning of the Massachusetts court in marking this line of distinction, although in harmony with the conclusion in the Corliss case, and rather vaguely intimate that all persons, whether of a public or private character, have rights of privacy. But to obtain relief such rights must be based upon a threatened injury to property rights. The common-law rule is still followed in Michigan. The case above cited of Atkinson v. Doherty was a suit for injunction to restrain defendant, a cigar manufacturer, from using the name of complainant's deceased husband, together with his picture, on the label of cigar boxes. The bill of complaint was dismissed by the circuit judge, and his decree was affirmed in this court. While admitting the impertinence and indelicacy of the action of defendant, and the disapproval of society, the court sees no actionable wrong in the publication, and therefore declines to grant the relief prayed "for," the court says: "As the right alleged is not a property right and does not spring from any contract, it must follow that relief must be in an action for damages for a breach of duty upon an actionable wrong, or a suit to prevent a threatened injury. In either case such action must be based upon an act done or threatened which the law looks upon as a tort; and if the act complained of is one which is not in the law denominated a wrong, there is no legal remedy." Further on the court suggests that all men are not alike in the matter of delicacy of feeling and consideration for the feelings of others, and these things depend upon disposition and education of the individual. Some men are naturally sensitive, others brutal. The former will suffer keenly from an act or word that has no effect upon the latter. "Manifestly the law cannot make a right of action depend upon the intent of the alleged wrongdoer or upon the sensitiveness of another," and although injury to feelings is recognized as a ground for increasing damages the law has never given a right of action for injury to feelings merely." The Michigan court is in error when making the statement that the law has never given a right of action for injury to feelings merely at least, if intending in this statement that courts have not so decided it is in fault. It was the settled law in Indiana previous to the more recent decision in Western Union Tel. Co. of Ferguson,[9] that there may be a recovery for damages where the basis of the action is mental anguish alone. And the courts of Tennessee, North Carolina, Alabama and Texas have also so decided, following the reasoning of the So Relle case.[10] The following cases were decided at an early day of this controversy. They involved the publication of pictures and relief therein was based on property rights.[11] As before stated the Schuyler case was reversed by the New York Court of Appeals.[12] This court reversed the decision of the court below upon the ground that no one's feelings were

[7] Gee v. Pritchard, 2 Swanston, 402; Folsom v. Marsh. 2 Story, 100; Abernethy v. Hutchinson, 3 Law J. 209; Caird v. Sime, 12 App. Cases, 326; Tipping v. Clark, 21 How. 383; Williams v. Assurance Co., 23 Beav. 338; Prince Albert v. Strange, 1 Macn. & G. 25.

[8] 121 Mich. p. 372.

[9] 59 N. E. Rep. 416.

[10] 55 Tex. 308.

[11] Prince Albert v. Strange, *supra;* Tuck v. Priester, L. R. 192 B. Div. 629; Pollard v. Photographic Co., L. R., 40 Ch. 345.

[12] 31 South. Rep. on p. 286, 49 Am. St. Rep. 671

injured. That death terminated the right. The court, said among other things: "A woman's right of privacy, in so far as it includes the right to prevent the public from making pictures, busts or statues of her to commemorate her worth or services, does not survive her so that it can be enforced by her relations." Therefore, the court assumed the case to depend upon the right of the relatives in the family privacy of the deceased, and held that this was not a proper case where those rights were in question. The mere fact that a person's feelings may be injured by the erection of a statue to a deceased relative is not ground for an injunction against its erection, unless there is reasonable and plausible ground for the existence of mental distress and injury of that character. And this distress and injury must not be the result of mere imagination or caprice, the result of a morbid mental condition giving under emphasis to the sacred character of the right of privacy. Mr. Justice Gray strongly dissents from this opinion of the majority of the court: "I cannot see" he says, why the right of privacy is not a form of property as much as is the right of complete immunity of one's person. If is property right with reference to the publication of a catalogue of private etchings and entitled to be protected against invasion, as Lord Cottenham held in Prince Albert v. Strange, why is it not such with reference to name and reputation?" And again: "It seems to me clear that the jurisdiction of equity is not made to depend upon the existence of corporal property, and that it is exercised whenever the complainant establishes his claim to the possession of exclusive personal rights and their violation in definite ways, for which an action at law cannot afford plain and adequate redress. This is the case here." And further: "If it be true that there is no known application at common law of the principle, does not that natural justice with which equity is synonymous require that equity supply the deficiency, or enlarge the operation of legal principles and grant the shield of the law to the name and memory of the deceased, at the instance of her relatives." The dissenting justice also intimates that the family heritage of the name and memory of an ancestor may be a legal right which courts must protect. Mr. Justice Gray was influenced no doubt by the broad sense of duty which moved Lord Cottenham in announcing the power of equity as he understood it when he said: "I think it is the duty of this court to adopt its practice and course of proceeding to the existing state of society and not by too strict an adherence to forms and rules established under different circumstances, to decline to administer justice and enforce rights for which there is no remedy. If it were necessary to go much further that it is, in opposition to some highly sanctioned opinions, in order to open the door of justice in this court to those who cannot obtain it elsewhere, I would not shrink from the responsibility of doing so."[13]

In line with the advanced ideas of Lord Cottenham and the opinion of Mr. Justice Gray is the New York court, in the latest decision involving this question of the right of privacy, Robeson v. Rochester Folding Box Co.[14] In this case the court found that there was jurisdiction in equity to protect one from injury to her right of privacy, and that such jurisdiction was independent of the question of right of property. This case was decided on demurrer to the complaint at the special term supreme court, July, 1900. The question of the right of privacy was fully presented and covered in the opinion. The complaint was in no sense a public character. The facts are as follows: Without the knowledge or consent of the complainant, an infant, have made, printed, sold and circulated about 25,500 lithographic likenesses of her for the purpose of profit and gain to themselves; that the likeness is made upon white, tough paper, which is about twenty-two inches wide and thirty inches long, which contains a large profile view of the complainant. The central portion of the paper above the likeness contains the words in large plain letters, "Flour of the Family." Below the likeness are the words in large capital letters "Franklin Mills Flour," and in the lower right hand corner, in small capital letters are the words, "Rochester Folding Box Company, Rochester, New York." In the lower left hand corner is a picture of a large flour chest upon which appears the words "The Franklin Mills;" also in the same corner is a picture of a barrel and a flour sack with the words printed thereon "The Franklin Mills of Lockport, N. Y." The complaint also

[13] Wallworth v. Holt, 4 Myl. & C. 619.
[14] 65 N. Y. Supp. Rep. 1109.

alleges that the defendants here caused the lithographs to be conspicuously posted and displayed in stores, warehouses, saloons and other public places throughout the United States and other countries, and particularly in the vicinity where the plaintiff resides; that when she was informed of the use of her likeness she was made sick and suffered a severe nervous shock and was confined to her bed, and compelled to have a physician; that she has been greatly humiliated by the scoffs and jeers of persons who have recognized her features in the lithograph, and then with the usual charges of damages complainant asks that defendants be perpetually enjoined from making, printing, publishing, circulating or using in any manner, any picture, likeness, photograph or lithograph of herself. The New York court takes an advanced position on this question in this case, and the views of Mr. Justice Gray of the broad field of equity jurisdiction seem to be adopted as the rule of that court hereafter.

In the case above reported, without preliminiary remarks, the court goes directly at the question with the assertion that the principle involved is whether the defendants have the right to publish and circulate copies of complainant's likeness for the purpose of profit and gain to themselves without her consent. The defendants claiming that she was powerless to prevent this, and that there was no authority int he court to restrain by injunction. And the Michigan case, Atkinson v. Doherty, was relied upon in the contention that the feelings of persons under similar conditions could be outraged with impunity, and the "indelicacy" and "impudence" referred to by the Michigan court must go unpunished. "If such were the fact," says the New York court, "it would certainly be a blot on our boasted system of jurisprudence, that the courts were powerless to prevent the doing of a wrongful act which would wound in the most cruel manner the feelings of a sensitive person. The infliction of mental pain and distress by the wrongful or unauthorized act of another gives a cause of action in many cases such as libel and slander, and in all actions of tort, when the wrongful act of another causes injury. So also in an action for a breach of promise of marriage, the law recognizes that the infliction of such distress and disgrace is ground for recovery against the wrongdoer. I am aware that many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages when he is entitled to recover damages upon some other ground. It will be generally found, however, that they are speaking of cases of personal injury. If injury to the feelings be an element of actual damage in libel, slander and breach of promise cases, it would seem that it should be equally so in cases of this character. It has been remarked by a learned author that the mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter. The plaintiff's claim for equitable relief is not that of mere protection to wounded feelings, that the protection of her right of privacy and the right of property in her own likeness." And again: "To permit every person to use a lithographic likeness of the plaintiff to advertise their business, and yet say there is no power in the courts to prevent it, would be asserting a proposition at war with the principles of justice and equity, and in violation of the sacred right of privacy. Every personal interest which she possesses must be regarded as private, especially when the public has acquired no right in them. Privacy is regarded as a product of civilization." Concluding this opinion the court holds that: "Every woman has a right to keep her face concealed from the observation of the public. Her face is her own private property, and no photographer would have a right to take advantage of the privilege of taking her photograph for her own private use, to make copies from the negative and sell them to the public.

In the sententious statement of Judge Cooley[15] may be found the seed of this growth in equity jurisdiction in this country. "The right of one's person may be said to be a right of complete immunity to be let alone."

PERCY L. EDWARDS.

Washington, D. C.

[15] Cooley on Torts, p. 29.

LIFE INSURANCE — PRESUMPTION OF SURVIVORSHIP AS AFFECTING VESTED INTEREST OF BENEFICIARY.

UNITED STATES CASUALTY CO. v. KACER.

Supreme Court of Missouri, Division No. 1, June 18, 1902

Where a life policy provided that it was to be paid, upon the death of the insured, to his daughter, if surviving; if not to his legal representatives,—the daughter had a vested interest upon the issuance of the

policy, liable to be defeated by the happening of a condition subsequent; and the legal representatives had a contingent interest, depending upon the divestiture of the daughter's vested interest, which they were required to prove before they were entitled to the proceeds of the policy.

STATEMENT OF FACTS.—This is a bill of interpleader in equity to determine the right to $8,000, proceeds of two policies of accident insurance issued by the plaintiff upon the life of Harry C. Yocum, and by the company paid into court. The interpleaders represent, respectively, the legal representatives of Harry C. Yocum, the assured, and his daughter, Florence, the primary beneficiary under the policies. At the request of the appellant the circuit court made a special finding of fact, under section 685, Rev. St. 1899, which, although not binding upon this court in this equity case, fairly, and, for all the purposes of this case, substantially states the facts shown upon the trial, and it is therefore adopted by this court. It is as follows: "On June 16, 1897, Harry C. Yocum, of St. Louis, a widower, made two applications, on the printed blanks furnished by the company, to the United States Casualty Company of New York, for policies of accident insurance of $5,000 each. These applications were made to the agent of the company in St. Louis. These applications are in the usual form, containing information as the basis for the policy. They include a printed formas follows: '(14) I desire the death benefit made payable.' Then follows a blank for the name of the beneficiary, relationship and postoffice address. This blank was filled in with the written words, 'Miss Florence Yocum, daughter, Planters House, St. Louis, Mo.' On these applications two several accident policies were issued on July 16, 1897, to Yocum, containing the usual provision for the payment of indemnity for loss of life occasioned by external, violent and accidental means. By the terms of each policy the indemnity for loss of life was made payable to 'Miss Florence Yocum, daughter, if surviving; if not, to the legal representatives of the insured;' the words, 'Miss Florence Yocum, daughter,' being written; the remaining words of the clause being in print, and part of the printed form of the policy. These policies were for one year, and at the expiration of the year were renewed, without change of terms, for another year. The first clause in each policy begins as follows: 'In consideration of the agreements and warranties in the application for this policy, which application is made a part of this contract of insurance,' etc. Florence Yocum was the only child of Harry C. Yocum; was between eighteen and twenty years old; was living with and dependent upon him. Yocum was fifty-one years old. On December 30, 1898, Yocum, with his said daughter and two young lady friends, left New Orleans on the naphtha yacht Paul Jones, to make a trip over the Gulf of Mexico to Belleair, a point on the Florida coast. The yacht was about fifteen feet wide by fifty feet long. It was propelled by an explosive engine, with naphtha for fuel. The crew consisted of a pilot, an engineer and two hands. The yacht failed to arrive at its destination. Search was instituted by the father of one of the girls in the party, and at length on the shore of an island in the gulf fragments of the yacht were found, also a portion of the hull. The naphtha tank was also found intact, and containing naphtha. The body of Miss Taggart, one of the party, was found in April, 1899, on a small island, dressed, with the exception of shoes. The body of the pilot was also found on another island, about thirty miles distant, about the same time. No other bodies were found. I find from the evidence that the yacht Paul Jones was wrecked, and that all on board, including both Harry C. Yocum and his daughter, perished. There is no testimony to show how the disaster occurred—whether by storm or collision. I cannot find as a fact that Harry C. Yocum survived his daughter, or that she survived him; nor can I find that they both died at the same moment, or that they died from the same immediate cause. These facts of manner and time of death are not capable of being judicially ascertained. On the foregoing facts I find, as a matter of law, that the representatives of Florence Yocum are entitled to the proceeds of the policies. Franklin Ferris, Judge." In addition to such finding of facts and conclusion of law, the learned trial judge rendered an able, clear and comprehensive opinion, which counsel have reprinted in full in the briefs, and which has been of much service to this court in the examination and adjudication of this case. The trial judge held (1) that the application and policy must be construed together and harmonized, if possible, and that there is no inconsistency between them in respect to who should be the beneficiary or beneficiaries thereof (that is, that the printed provision of the policy, providing that, if Florence did not survive her father, the policy should be payable to his legal representatives, was additional to, and not inconsistent with, the provision of the application that the loss should be payable to Florence); and (2) "that even in case where the contract of insurance is to pay the beneficiary named, 'if surviving,' such beneficiary takes a vested interest, subject to be devested if he fails to survive, and that, until it is proved that he failed to survive, his legal representatives have a *prima facie* right to the proceeds of the policy." From this decision the representative of the assured appealed.

MARSHALL, J. (after stating the facts): It is due to the counsel for the respective parties hereto to say that their briefs are full, forceful and exhaustive of the subject, and leave no light unturned upon the controversy, and that, with the opinion of the trial judge, they have materially lightened the labors of the court in this rather unusual and very interesting case. The view herein taken renders it unnecessary to decide all the questions presented. The first inquiry in

such a case as this necessarily is, what interest does the beneficiary take in an ordinary life policy? And there is no difference as to an accident policy. The appellant differentiates between the policy and the fund to arise out of the policy, and says the beneficiary has a vested interest in the policy, but not a consummated, complete right to the fund; or, otherwise stated, the beneficiary has a vested interest in the policy, but only a conditional interest in the fund. On the other hand, the respondent contends that a beneficiary has a vested interest in the policy and the money to become due under it, which cannot be devested by the assured or the company, or both, without the consent of the beneficiary, and in case the beneficiary dies before the assured that vested interest passes to the legal representatives of the beneficiary, as a chose in action. The subcontentions of the respective parties are that the appellant contends that if the policy is payable to a primary beneficiary, "if surviving," and, if not, to an alternative beneficiary, the term "if surving" is a condition precedent to the right of the primary beneficiary or his legal representatives to recover, and hence the burden of proof is upon him or them to prove that he survived the assured. On the other hand, the respondent contends that the term "if surviving" is a condition subsequent, and that the primary beneficiary, or his legal representatives, must recover unless it be proved that the primary beneficiary did not survive the assured, and hence the burden of proof is upon the alternative beneficiary to show that the primary beneficiary did not survive the assured. And incidentally the parties hereto have considered the question of the rule in case of the death of two persons in a common disaster. This proposition is best disposed of before considering the other questions raised.

In all jurisdictions that proceed according to the policy of the common law there is no presumption as to survivorship in case of a common calamity. The rule is that he who claims a right by virtue of survivorship must prove the fact of the survival of him through whom he claims, and that, failing in this, the property or fund remains vested as it was before the calamity. Lawson, Pres. Ev. p. 298, rule 54. The rule is stated in 1 Tayl. Ev. (9th Ed.) p. 182, as follows: "A mass of ingenious reasoning clusters about the question, what presumption of survivorship exists when several persons perish in a common accident? The common sense of English law, after some slight attempts to adopt them, discards the intricate presumptions of the civil law, as based on age, health, sex, etc., and adopts the rule that there is no presumption on the subject whatever; that he who relies on the fact of survivorship must establish it as best he can." Greenl. Ev. (16th Ed.), after speaking of the presumptions that obtain according to the Roman and civil laws, says, in note 5 to section 30, p. 126: "The rule as now established by the English and American cases is that where it is proved that two or more persons perished in the same calamity, there is no presumption of law that one survives the others, or that all perished at the same time; the burden of proving the one survived the others, or that all perished simultaneously, is on the person who asserts such to be the fact." The inquisitive legal mind will find the subject discussed and the principal decisions collated in a note to the case of *In re* Willbor (R. I.), 37 Atl. Rep. 634, 51 L. R. A. 863, 78 Am. St. Rep. 842, which is so exhaustive that a reference to it is all that is necessary to dispose of this incidental proposition in this case, and which leads to the abbreviated statement of the law that there is no presumption, but it depends upon the fact, and the fact must be proved by him whose recovery depends upon the establishment of the fact of supervivorship.

But this does not settle the case, because the representatives of the father and daughter each claim that the rights of the other depend upon their showing which of the two survived the other, and hence each claims the burden of proof is upon the other. The representative of the father further claims that, if neither can prove what the fact in this regard was, then the doctrine of "distribution" applies, and the fund must go where it would have gone if there had been no appointed beneficiary in the policy, to-wit, to the representative of the assured. In support of this contention counsel cite many cases relating to the disposal of property where two persons, entitled thereto in the alternative, perish in a common disaster, and which hold that in such cases the property is distributed according to the statute of descents. Types of such cases are Fuller v. Linzee, 135 Mass. 468 *et seq.* (*Quære:* Is this case overruled by Millard v. Brayton, 177 Mass. 533, 59 N. E. Rep. 436, 52 L. R. A. 117, 83 Am. St. Rep. 294?); Newell v. Nichols, 75 N. Y. 78, 31 Am. Rep. 424; Hildebrandt v. Ames (Tex. Civ. App.), 66 S. W. Rep. 128. See *contra*, Irwin v. Insurance Co., 16 Tex. Civ. App. 683, 39 S. W. Rep. 1097, and decisions of the Supreme Court of Texas in Insurance Co. v. Ireland, 17 S. W. Rep. 617, 14 L. R. A. 278; Splawn v. Chew, 60 Tex. 534; Byrne v. Casey, 70 Tex. 247, 8 S. W. Rep. 38. Upon this contention the circuit court properly held that those cases had application only to the distribution and transmission of estates, and were totally inapplicable to policies of insurance. One essential difference is sufficient to point the rule: In cases of ordinary property no one has any vested interest during the life of the absolute owner thereof, under the maxim, "*nemo est hæres virentis*," but has only an expectancy, dependent upon the death of the owner during the lifetime of the expectant, and upon the further contingency that the owner did not dispose of the property by deed, gift, or will made before his death, whereas in case of a policy of insurance the beneficiary has *ab initio* an interest in the policy, which neither the assured nor the company can impair

or take away by any act or deed without his consent. Association v. Bunch, 109 Mo., *loc. cit.* 580, 19 S. W. Rep. 25. This naturally leads to the question, what is the nature and character of the interest that the beneficiary in a life insurance policy has? In Bank v. Hume, 128 U. S., *loc. cit.* 206, 9 Sup. Ct. Rep. 44, 32 L. Ed. 370, Mr. Chief Justice Fuller, speaking for the Supreme Court of the United States, said: "It is, indeed, the general rule that *a policy, and the money to become due under it* [the italics are superadded to point the applicability of the language used to the respective contentions of the parties hereto as to the interest of the beneficiary in the policy and in the fund], belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named." The rule is thus stated in 3 Am. & Eng. Enc. Law (2d Ed.), p. 980: "In ordinary life insurance, where no power of divestiture is reserved, the general doctrine prevails that the issue of the policy confers immediately a vested right upon, and raises an irrevocable trust in favor of, the party named as beneficiary,—a right which no act of the insured can impair without the beneficiary's consent." In support whereof, cases are cited in note 10 which show this to be the rule in England, Canada, Supreme Court of the United States, Alabama, Arkansas, California, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. It is further noted (*Id.* 982) that a contrary doctrine prevails in Tennessee and Minnesota, where it is held that the beneficiary has no such interest as would prevent the insured from disposing of the policy by assignment, will, or change of beneficiary. And (*Id.* 984) it is pointed out that in Gambs v. Insurance Co., 50 Mo. 44, it was held that in case the policy was made payable to the wife or the assured, and she died, and the assured married again, the assured had a right to change the beneficiary named in the policy, and make it payable to the second wife instead of to the first wife. The reasoning upon which this conclusion was based was that it must be supposed that the husband intended to make a provision for his wife in case he died before she did, and that he did not intend after she had died, he being alive, to spend his money keeping alive a policy for the benefit of his deceased wife's relatives, who did not even have an insurable interest in his life; and as he had changed the beneficiary and had died, and the company had paid the insurance to his second wife, it was held that the administrator of the first wife's estate could not recover from the insurance company again. This reasoning overlooks the fact that if the husband did not want the insurance to go to the representative of the first wife, and desired to provide for the second wife, the way was open to him to so arrange it by simply letting the policy lapse for non-payment of premiums, so far as he was concerned, but the deceased wife's representatives could prevent a forfeiture of the policy by paying the premiums, and by taking out a new policy for the second wife. The decision is evidently influenced by the consideration that the deceased wife's representatives had no insurable interest in the life of the husband. But this overlooks the fact that they recover by reason of the policy being a chose in action of the wife, and not by reason of their having any insurable interest in the husband's life. The American and English Encyclopædia of Law does not note that this case is practically overruled by the case of Association v. Bunch, 109 Mo., *loc. cit.* 580, 19 S. W. Rep. 25, which case is followed and expressly approved in Wells v. Association, 126 Mo., *loc. cit.* 638, 29 S. W. Rep. 607, and the right of subsisting beneficiaries is limited to benefit certificates in fraternal beneficial associations, because such right of substitution is reserved to the assured by statute, or by the terms of the constitution and by-laws of such associations, but as to ordinary life insurance it is expressly said that the beneficiary has a vested interest in the policy. To avoid further misunderstanding, the case of Gambs v. Insurance Co., 50 Mo. 44, is hereby expressly overruled.

It being thus ascertained that the beneficiary of an ordinary life policy has a vested interest in the policy and the money to come out of it, the next question in this case is, what is the true meaning of the term "if surviving?" Does this destroy the vested interest that without such provision in the policy would pass to the beneficiary the moment the policy was issued, and make the interest of the beneficiary a contigent one, dependent upon the beneficiary surviving the assured? In other words, do those words create a condition precedent, or do they leave the interest of the beneficiary a vested interest, but liable to be defeated by the death of the beneficiary before that of the assured? In other words, do these words create a condition subsequent? Without such words the interest of the beneficiary is a vested interest. The addition of such words does not change the nature or character of the interest of the beneficiary as long as the beneficiary lives. It only affects the question of who is entitled to the money arising out of the policy in case the beneficiary dies before the assured. Where a particular person is named in a policy, without any such or similar words of qualification, the interest of the beneficiary is a vested interest; and, this being so, if the beneficiary dies before the assured, that vested interest passes to the legal representatives of the owner of such vested interest, and the interest is not devested or impaired by reason of the death of the beneficiary. 3 Am. & Eng. Enc. Law, p. 987; Cent. Dig. p. 2391, § 1470 *et seq.* For the express purpose of avoiding this result, and of con-

trolling the channel of succession in case the beneficaries died before the assured, the practice grew up of reserving a "divestiture" in such cases; that is, of providing that, if the primary beneficiary was not living when the assured died, the policy and the money arising out of it should go to a named alternative beneficiary; thus preventing the same from passing to the legal representatives of the primary beneficiary, as it otherwise would do. This is called a "reserved power of divestiture," which means, of course, a divestiture of a previously vested interest, and not merely a divestiture of an expectancy; for, if the interest of the beneficiary be merely an expectancy, dependent upon the beneficiary outliving the assured, then, of course, if the beneficiary did not do so, the expectancy would fail, and there would be no necessity for reserving a power of divestiture. No interest could vest under a mere expectancy, prior to the happening of the condition upon which it depended, and, none having vested, there would be nothing to devest. Such terms in a policy therefore provide for a divestiture of the vested interest of the primary beneficiary, and create a contingent interest in the alternative beneficiary, that is, the alternative beneficiary only becomes entitled to the fund upon the happening of the contigent event of the death of the primary beneficiary before that of the assured. In other words, such a provision in a policy does not make the interest of the primary beneficiary a contingent interest, dependent upon, and to attack only in case of the death of the assured before that of the primary beneficiary, but creates a vested interest in the primary beneficiary, which may be devested by the death of the primary beneficiary before that of the assured, and creates, also, a contingent interest in the alternative beneficiary, to take effect only in the event the primary beneficiary died before the assured. Or, otherwise stated, a policy payable to a named beneficiary, but with such words of divestiture, creates a vested interest in the policy, and the money to arise out of it, in the primary beneficiary, coupled with a condition subsequent that the vested interest shall be devested out of the primary beneficiary and his representatives, and vested in the alternative beneficiary, upon the happening of the subsequent contingency of the primary beneficiary dying before the assured. It necessarily and logically follows that if the primary beneficiary has a vested interest, which can only be devested upon the happening of a contingency, and the alternative beneficiary has only a contingent interest, dependent upon the divestiture of the vested interest of the primiary beneficiary, the primary beneficiary, or his legal representative, is entitled to the policy and the money arising out of it, unless the alternative beneficiary shows by competent evidence, as a fact, that the vested interest has been devested, and that the contingent interest of the alternative beneficiary has become a vested right by reason of the happening of the contingency provided thereof. Paden v. Briscoe, 81 Tex. 563, 17 S. W. Rep. 42; Cowman v. Rogers, 73 Md. 404, 21 Atl. Rep. 64, 10 L. R. A. 550; Thomas v. Cochran (Md.), 43 Atl. Rep. 792, 46 L. R. A. 160; Hopkins v. Insurance Co., 40 C. C. A. 1, and note (s. c. 99 Fed. Rep. 199).

In this case Florence was the primary beneficiary, and had a vested interest, liable to be defeated by the happening of a condition subsequent. The legal representatives of the assured are the alternative beneficaries, who have only a contingent interest, depending upon the happening of the condition subsequent,—the divestiture of Florence's vested interest. Florence or her legal representatives are therefore entitled to the money unless it is shown that her vested interest was devested. The alternative beneficiary is not entitled to the fund until the vested right of the primary beneficiary has been devested. If the vested interest is not shown to have become devested, Florence or her legal representative is entitled to the money. Neither she nor they, therefore, are called upon, in the first place, to prove a negative; that is, that she is not entitled to the money, because her vested interest has become devested. But the alternative beneficiary is not entitled to recover unless the vested interest has become devested. The burden of proof is therefore clearly and logically upon the alternative beneficiary to show a divestiture. Inasmuch as no such proof is offered, or, in the circumstances of this case, could be offered, it follows that the money must go just as the policy provided, to-wit, to Florence. The assured so arranged it. The company so agreed that it should go. The law leaves it where it is, because it cannot be devested or disturbed, for want of proof that the vested rights of the primary beneficiary had become devested, and the contingent rights of the alternative beneficiary had become vested.

The judgment of the circuit court is right, and is affirmed. All concur.

NOTE.—*The Doctrine of Vested Interest as Affecting the Question of Survivorship Where the Insured and the Beneficiary in a Regular Life Insurance Policy Perish in a Common Disaster.*—The principal case is one of great importance as it adds a fourth case in the jurisprudence of this country on the very difficult question stated as the subject of this annotation. Further than this, the facts out of which this case arose, attracted general interest throughout the country because of the prominence of the parties involved in it and of the accident which gave rise to the litigation. Strange to say, however, none of the public prints, whether professional or otherwise, discerned or discussed the point of real difficulty. The point seized upon as most important was that of survivorship in a common disaster, and the public press was filled with learned disquisitions on the distinctions between the common and civil law on this fascinating question. This question may indeed be an interesting one from an academic standpoint, but it has certainly no interest to the lawyer as a question of practical importance. It is well settled in this country that the law will raise absolutely no presumptions of survivorship based on the age, sex or condition of those who perish in a common disaster. The law on this

question is well stated and fully discussed in the leading case of Newell v. Nichols, 75 N. Y. 78.

But the important question in this case is not one of survivorship in a common disaster, nor is it one of vested interest under a policy of life insurance, but rather a complication of both questions. To state the question concretely let us suppose A and B, the insured and beneficiary respectively in a policy of life insurance, perish together in a common disaster, so that it is impossible to decide as a matter of fact which of them died first. Suppose, also, that the policy provides that the fund represented by the policy shall go to B, the beneficiary, "if surviving;" otherwise to the representatives of A, the insured. Who shall recover, the representatives of A or of B? This question suggests another: On whom is the burden of proof? It is certain that the one who has the burden of proof must fail. Still a third question is suggested, the very kernel of the difficulty: Does the phrase, "if surviving," constitute a condition precedent or a condition subsequent? On this question the authorities are now equally divided, one line of authorities holding that the phrase "if surviving" is a condition precedent; that upon the representatives of the beneficiary rests the burden of proving survivorship, and that, therefore, this being impossible, the representatives of the insured are entitled to recover. Fuller v. Linzee, 135 Mass. 468; Hildenbrandt v. Ames (Tex. Civ. App. 1902), 66 S. W. Rep. 261. The two authorities holding an absolutely contrary doctine are Cowman v. Rogers, 73 Md. 403, and the principal cases.

The doctrine of vested interest as applied to life insurance contracts is very difficult of definition and of exact limitation. That question, however, has been thoroughly discussed in a previous number of the CENTRAL LAW JOURNAL to which we respectfully refer the reader. 53 Cent. L. J. 188. In this annotation we shall confine ourselves to a full consideration of the four important cases which have attempted to solve the difficult question here presented.

Fuller v. Linzee, 135 Mass. 468, decided in September, 1883, was the first case involving this identical question that arose in this country. In this case a policy of insurance issued by an insurance company recited that the company agreed with the assured to pay the sum contracted for in the policy to the wife within ninety days after notice and proof of death. The policy further provided that "in case the said assured should die before the decease of" her husband, the amount of insurance should be payable to his children. The policy was procured by the husband, and all premiums paid by him. The husband and wife and all their children were lost at sea, and there was no direct evidence as to which survived the other. In a contest over the fund between the next of kin of the wife and the representatives of the husband, the court on appeal held that the interest of the wife in the policy was contingent on her surviving her husband; that the burden of proof was on the wife's next of kin to show that she survived; and that, therefore, this being impossible, the representatives of the husband were entitled to the fund. The court said: "Mr. Fuller procured the contract in order to make provision for his wife and children after his death. This provision he made, not by settling property upon them with limitations and successions, but by providing for payments of money to be made to them after his death. He was providing for the disposition of a fund that was not to exist until after his death, and he made the provision by designating the persons to whom it was to be paid, and his obvious intention was, that it should be paid to his wife if she should survive to take it. We think, upon the view of the contract thus taken, that the wife had no interest transmissible to her next of kin unless she survived her husband, and that they cannot maintain their claim without proof that she survived him."

The next case on this question was Cowman v. Rogers, 73 Md. 403, decided in January, 1891. This case arose out of that appalling disaster known as the Johnstown flood. In this flood perished a husband and wife, the insured and beneficiary, respectively, under a certain benefit certificate, and whose next of kin were the parties litigant in the case to which we have just made reference. The regulation of the association in which the husband was insured, provided that, if the beneficiary named in the certificate should die in the lifetime of the insured, the fund becoming due under the certificate should be payable to certain relatives of the insured in a certain order therein named. The trial court found against the wife's next of kin and in favor of the husband's relatives entitled to it under regulations of the order. On appeal this decree was reversed, the appellate court holding, first, that there was no presumption of survivorship, and second, that in the absence of competent and sufficient evidence to show that the wife, the nominated beneficiary, died before her husband, her legal representatives were entitled to the fund. The court said: "Mrs. Hoopes was the beneficiary named in the certificate. Her representative has a *prima facie* title to the fund. That title can only be devested by evidence showing that she died before her husband. They are both dead and both died in the same disaster. There is no proof and there is no legal presumption as to which one died first, or as to their having died simultaneously. Until it is shown that she died before her husband, the fund is payable to no one else other than her representative, because it is only in the event of the death of the nominated beneficiary in the lifetime of the assured that others can possibly take. Until proof of her having so died is first furnished her *prima facie* title cannot be displaced."

The next case was that of Hildebrandt v. Ames (Tex. Civ. App. 1902), 66 S. W. Rep. 128, which took sides with the Massachusetts court, and denied that the doctrine of vested interest in any way effected the burden of proving survivorship where insured and beneficiary perish in a common disaster. This is an exceptionally strong case and well reasoned. In this case insured and the beneficiary, who was the wife of insured, both perished in the flood which swept over the city of Galveston recently. The policy which protected the life of the insured provided that it should be payable to the wife "if living," otherwise to the executors of the insured. The court held first that the burden of proof was on the representatives of the beneficiary to show that his decedent had survived the insured; second, that the evidence was insufficient to raise an issue of survivorship; and third, that the fund should be distributed as if both insured and beneficiary had died simultaneously, not because there was any presumption to that effect, but because there was no evidence to the contrary. Therefore, the administrator of the beneficiary, who was only to take "if surviving," took nothing under the policy, the proceeds of which reverted to the insured's estate. Counsel for the administrator of the insured relied almost exclusively on the article in the CENTRAL LAW JOURNAL already referred to, and the court adopted the argument and reasoning therein set forth almost *verbatim*. The court, through Mr. Justice Pleasants, said: "We think the contract in its nature is analogous to that of an express trust. The insured is the grantor or cre-

ator of the trust, the insurance company the trustee, and the beneficiary the *cestui que trust*. While the trust fund out of which the beneficiary is to receive the amount named in the policy cannot, strictly speaking, be said to have been created by the insured, by the terms of the contract he secures an interest in a fund provided by the insurance company equal to the amount named in the policy, payable at his death; and under this contract, which he obtains and keeps alive by the payment at stated times during his life of certain specified amounts to the insurance company, the amount named in the policy is held by the insurance company in trust for the beneficiary. If we consider the policy of insurance of partaking of the nature of a trust, rather than a chose in action, it is at once seen that the interest of the beneficiary is not a "vested" interest, in the broadest sense of that term, and the trustee cannot be compelled to execute the trust until the contingency happens which entitles the *cestui que trust* to its execution. It follows that the burden is upon the beneficiary to show that such contingency has happened, and all the conditions which are necessary to vest the title to the fund in him have been complied with, and unless the beneficiary's right to the fund be shown there is a failure of the trust, and the fund reverts to the insured or his representatives."

The fourth case on this question is the one which we publish at the head of this annotation. It would do injustice to the great court which handed down this decision and to the learned justice who wrote the opinion, not to admit that its argument is a most persuasive one, indeed the greatest argument that has been made on that side of this particular question. From a purely technical standpoint no just criticism can be made of this decision. Its premises are not faulty and its conclusions cannot be said to be extravagant deductions. One great and important element, however, is overlooked—the intent of the insured. The purpose of the insured in contracting for the policy was to provide for his daughter's pecuniary welfare after death and by providing that she shall take only "if surviving" clearly shows that he does not intend she shall enjoy the fund unless she does survive. It is the sheerest quibble to extend the doctrine of vested interest into such a case in order to cast the burden of proof on the insured's representatives and thus defeat the plain intention of the insured. The father in the principal case procured the policy for the benefit and protection of his daughter *after his death* and for that purpose alone he faithfully kept up the payment of the premiums thereon. It is no stretch of the imagination to say that it certainly was not his intention that this entire fund should, under any circumstances, become the property of distant relatives of his daughter on her mother's side, who had no interest whatever in his life. It is more natural to suppose that in such a case he would prefer his own estate or his own relatives as the beneficiaries of the fund. The argument by which the court in the principal case is led on to its conclusion may be fascinating and persuasive in its apparently exact logic but its fallacy is proved by the inequitable result at which it arrives. The law is not logic, it is justice, and a rule of law or method of legal reasoning, however logical, that leads to injustice, has no support in any respectable system of jurisprudence.

ALEXANDER H. ROBBINS.

BOOK RECEIVED.

Memorial—Henry Hitchcock, 1829-1902. Saint Louis, MCMII.

A Brief of Necroscopy, and Its Medico-Legal Relation. Arranged by Gustav Schmitt, M. D., Milwaukee. Funk & Wagnalls Company, New York and London, 1902, pp. 188, Bound in Flexible Leather. Price, $1.00.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

I note in your issue of August 1st an article upon "The Power of the Court to Set Aside Jury Verdicts." I enclose herewith an address which I delivered in July before the Texas Bar Association upon this same subject. In addition thereto I desire to call your attention to article 1372, Texas Revised Statutes, which regulates the practice in our state in this matter and reads as follows:

"Not more than two new trials shall be granted to either party in the same cause, except when the jury have been guilty of some misconduct or have erred in the matter of law."

It seems to me that the question of the proper relation of the judiciary to jury verdicts is the most important question before the bar at large at the present time, and certainly it is the most discussed question.

Yours very truly,

JOHN CHARLES HARRIS.

Houston, Tex.

HUMORS OF THE LAW.

A man who had brutally assaulted his wife was brought before Justice Cole of New York, and had a good deal to say about "getting justice."

"Justice!" replied Cole: "you can't get it here; this court has no power to hang you!"

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. APPEAL AND ERROR — Affidavit of Interest.—Acts 1898, No. 159, § 4, does not require affidavit as to appellant's interest in appointment of receiver in order to avoid a dismissal of the appeal, where the interest of

the appellant is admitted by all parties.—Davies v. Monroe Waterworks & Light Co , La., 31 South. Rep. 694.

2. APPEAL AND ERROR—Bill of Exceptions.—There can be no reversal for apparent error in an instruction, where the bill of exceptions does not show that all of the instructions offered, given or refused, are copied into the record.—Warren v. Nash, Ky., 67 S. W. Rep. 274.

3. APPEAL AND ERROR—Devolutive Appeal —A bond executed for the amount fixed by the court is good for a devolutive appeal, though insufficient for a suspensive appeal.—McSweeny v. Blank, La., 31 South. Rep. 636.

4. APPEAL AND ERROR—Instruction Given at Instance of Complaint.—An erroneous instruction, given at the instance of a party, cannot be complained of by him on appeal.—Ryans v. Hospes, Mo., 67 S. W. Rep. 285.

5. APPEAL AND ERROR Special Charge.—Error invited by appellant by a special charge is not reversible.—Clapp v. Royer, Tex., 67 S. W. Rep. 345.

6. ATTACHMENT—Defense.—In an action by an administrator to recover the value of goods which were levied on as the property of another, an answer that the goods were returned uninjured to the estate states a good defense.—Pinkard v. Willis, Tex., 67 S. W. Rep. 135.

7. ATTACHMENT—Notice to Tenant.—The failure of an officer, serving an attachment in a suit commenced by publication, to notify the tenant in possession of the land, and to state such fact in his return, as required by Rev St. 1889, § 543, defeats the jurisdiction of the court, and the purchaser of the land and his grantees acquire no title to the property.—Walter v. Scofield, Mo., 67 S. W. Rep. 276.

8. ATTACHMENT—Value of Goods.—In an action for wrongful attaahment, the inventory and appraisement made by the levying officer is competent evidence of the value of the goods.—Green v. McCracken, Kan., 67 Pac Rep. 857.

9 BAILMENT—Burden of Proof.—It is incumbent on a bailee to show that the loss of or injury to property in his possession is not due to his negligence.—Hislop v. Ordner, Tex., 67 S. W. Rep. 337.

10. BANKS AND BANKING—Authority to Arrange a Loan.—Where a bank permits its president as its agent to arrange a loan of money for the purchase of stock, it is estopped to afterwards deny the legitimate nature of the loan.—Roe v. Bank of Versailles, Mo., 67 S. W. Rep. 303.

11. BANKS AND BANKING—Defense of Payment.—If plaintiff suing for a bank deposit, received the proceeds of a check, payment of which was relied on as a defense, with knowledge that the money had been paid by defendant thereon, or the money was deposited to plaintiff's credit in another bank and drawn out by her or by her authority, the court should have instructed that she was not entitled to recover.—Phœnix Nat. Bank v. Taylor, Ky., 67 S. W. Rep. 27.

12. BENEFIT SOCIETIES — Notice of Assessments.—Though a by-law of a beneficiary insurance company requires the clerk of a local order to notify members of their assessments, his failure so to do held not to prevent a forfeiture for non-payment.—Chapple v. Sovereign Camp Woodmen of the World, Neb., 89 N. W. Rep. 423.

13. BENEFIT SOCIETIES—Reduction of Policy.—A life certificate, requiring the beneficiary to comply with by-laws, held not to authorize the association to reduce the face of the policy or deduct a percentage therefrom for an emergency fund by the enactment of by-laws.—Newhall v. Supreme Council American Legion of Honor, Mass., 63 N. E. Rep. 1.

14. BILLS AND NOTES—Bonds.—Bonds payable to a trust company, "trustee," or bearer, did not stand on the footing of bills of exchange; and the obligor, unless estopped, could make any defense against an assignee that he might have made against the payee.—Rodd v. Louisville Banking Co., Ky., 67 S. W. Rep. 63.

15. BILLS AND NOTES — Credits.—In an action on a note, where issue was amount of credits to be applied, the burden was on plaintiff to show the facts as claimed by him.—Miller v. Johnson, Ky., 67 S. W. Rep. 375.

16. BILLS AND NOTES — Renewal a Waiver of Defense.—One who renewed an old note, knowing that the holder was trying to collect it, held to have waived his defense as against the old note.—National Bank of Cleburne v. Carper, Tex., 67 S. W. Rep. 188.

17. BUILDING AND LOAN ASSOCIATION—Sale of Real Estate.—Notice of limitations on the authority of officers of a building association to contract for the sale of its real estate given to its agent held not notice to a purchaser to whom the information is not communicated. Domestic Bldg. Assn. v. Guadiano, Ill., 63 N. E. Rep. 98.

18. CARRIERS Discharging Passengers in a Dangerous Street.—If the street, at the place of discharging a passenger from a street car, is dangerous, and that fact is known to the carrier and unknown to the passenger, the carrier is bound to warn the passenger, or to assist him in safely alighting.—Sweet v. Louisville Ry. Co., Ky., 67 S. W. Rep. 4.

19. CONTRACTS—Condition Precedent to Recovery.—Plaintiff, having contracted to repair a street at so much per square yard, and fixed the manner in which the amount due should be ascertained, could not recover without showing a measurement by the person named in the contract to determine it, or reason for the omission.—New Tel Co. v. Foley, Ind., 63 N. E. Rep 56.

20. CONTRACTS Pleading.—Where plaintiff seeks to recover on a contract, and there is no allegation that he had performed his part, or any valid excuse for nonperformance, the petition is defective —William Deering Co. v. Claypool, Neb., 89 N. W. Rep. 373.

21. CORPORATIONS — Failure to File Statutory Statement.—In an action by the commonwealth against a foreign corporation for the penalty for doing business without filing the statutory statement, it being shown that defendant has done business in the state, the burden is upon it to show that it had filed the statement.—Commonwealth v. Read Phosphate Co., Ky., 67 S. W. Rep. 45.

22. CORPORATIONS—Sale of Corporate Property.—If directors of a corporation make a valid sale of property which one of them held in trust for it, the members of the corporation cannot subsequently invoke the principle that a trustee cannot deal with the trust to his own profit, though the trustee effects a subsequent resale and receives commissions therefor.—Tenison v. Patton, Tex., 67 S. W. Rep. 92.

23. COSTS — Stenographer's Fee for Costs.—A stenographer's fee for making transcript of his notes cannot be taxed as a part of the costs, unless the transcript was made by order of court —Albin v. Louisville Ry. Co , Ky., 67 S. W. Rep. 17.

24. COUNTIES—Action on Bond.—An action against the county treasurer on his bond is not prematurely brought, if begun after he has given a bond and qualified as his own successor.—Thomssen v. Hall County, Neb., 89 N. W. Rep. 389.

25. COUNTIES - Levy of School Tax.—Where the levy of a tax is directed by a court of competent jurisdiction for payment of a judgment, and the public officer having duty of levying it is negligent, the measure of damages is such actual damage as the individual entitled to recover has sustained.—School Dist. No. 80 of Nemaha County v. Burress, Neb., 89 N. W. Rep. 609.

26. COURTS—Jurisdiction.—An action by a city to collect personal property taxes, less than $2,500, involving a construction of Laws 1897, p. 213, is within the jurisdiction of the St. Louis court of appeals, under Const. art. 6, § 12.—City of Hannibal v. Bowman, Mo., 67 S. W. Rep. 214.

27. COURTS Jurisdiction.—In an action on a note and to foreclose a lien on county bonds as collateral, the market value determined the amount in controversy

with relation to the jurisdiction.—Wishey v. Houston Nat. Bank, Tex., 67 S W. Rep. 195.

28. CREDITORS' SUIT — Cemeteries.—Real estate, platted into lots and blocks. and dedicated for a public cemetery, cannot be reached by a creditors' bill.—First Nat. Bank v. Hazel, Neb., 89 N. W. Rep. 378.

29. CRIMINAL EVIDENCE — Reputation.—In a criminal prosecution, in which the ownership of a meat market became material, general reputation was not competent evidence thereof.—Steed v. State, Tex., 67 S. W. Rep. 328.

30 CRIMINAL LAW — Presumption of Correct Restoration of Information.—Where the certificate of the clerk of court states that the information on which the defendant was tried was not "the original information filed in this cause, but a copy as permitted to be restored by the court," it must be presumed that the restoration was correctly made —State v. Walker, Mo., 67 S. W. Rep. 228.

31. CRIMINAL TRIAL—Improper Comment.—The court's remarking, on sustaining an objection to certain evidence, that it understood the witness would answer against the accused, is not prejudicial, though improper, where the evidence offered was wholly immaterial. — Madden v. State, Tenn., 67 S. W. Rep. 74.

32. CRIMINAL TRIAL — Part of a Letter. — Permitting jury to take letter, part only of which was given in evidence, with them in their deliberation, held error. — Parker v. State, Tex., 67 S. W. Rep. 121.

33. DAMAGES— Injury to Employer. — Where a boy 19 years old, depending on his manual labor, has his left hand crushed to the wrist, verdict of $5,000 is not excessive. — Gray v. Commutator Co., Minn., 89 N. W. Rep. 322.

34 DAMAGES—Mortality Tables —Where, in an action for personal injuries, there was testimony on the part of plaintiff that his injuries were of a permanent character, it was not error to admit mortality tables in evidence.—Haines v. Lake Shore & M. S. Ry. Co., Mich., 89 N. W. Rep. 349.

35. DAMAGES - Suit by Next Friend.—In an action by a minor, by his next friend, for personal injuries, it was error to allow the jury, in estimating the damages, to consider medical bills; it not being shown that the minor's estate was liable therefor. — Bering Mfg. Co. v. Peterson, Tex., 67 S. W. Rep. 133.

36. DEATH Damages. - A verdict for $500 for the death of a man 68 or 70 years old, who was able to do light work, was not excessive. Chesapeake & O. Ry. Co. v. Dupee's Admr., Ky., 67 S. W. Rep. 15.

37. DEATH — Damages. — Under Ky. St § 6, giving a right of action for wrongful death the jury can allow compensatory damages if there was ordinary negligence, and punitive damages if there was gross negligence — Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Admr., Ky., 67 S. W. Rep. 383.

38. DEATH — Funeral Expenses. — Funeral expenses having been paid out of the fund recovered for wrongful death, the kindred of deceased, entitled to the remainder, are not entitled to be reimbursed out of the general estate.—O'Malley's Admr. v. McLean, Ky , 67 S. W. Rep. 11.

39. DEDICATION - Intent and Acceptance. — A dedication of land of a street cannot become effective until the intent to dedicate is combined with an acceptance by the public. — City of Huntington v. Townsend, Ind., 63 N. E. Rep. 36.

40. DEDICATION—Land Conveyed — The construction of viaduct by railway companies over a street and adjacent strip held not to widen the street, so as to constitute the strip of a highway, entitling the grantees of property abutting the strip to claim it on the discontinuance of the viaduct.—Huff v. Hastings Exp. Co., Ill. 63 N. E. Rep. 105.

41. DEEDS — Agreement to Support Grantor and Another. — Where a mother conveyed land to her son, on his agreement to support her and his imbecile brother, her heirs had no right, after her death, to have the deed canceled, on the ground that the grantee had failed to provide for her.—Arnett v. McGuire, Ky., 67 S. W. Rep. 60.

42. DEEDS—Delivery.— Where a deed was written by the grantee, who agreed to convey the land to others, and was then returned to the grantor to be acknowledged, there was a sufficient delivery.- Hudson v. Redford, Ky , 67 S. W. Rep 35.

43. DEPOSITIONS - Exceptions. - An objection to deposition that it was not taken in proper time will not be considered, where there was no claim that the objecting party desired to be present, or any evidence that he was in any way prejudiced. — Ueland v. Dealy, N. Dak., 89 N. W. Rep. 325.

44. DEPOSITIONS — Notice. — A notice to take depositions which stated that certain writings would be submitted to the witness for inspection held sufficient, though it did not state what the writings were which were to be submitted. - Birchett v. Bank of Shelbyville, Ky., 67 S. W. Rep 371.

45. DEPOSITIONS — Redeposit of Funds. — Where an outgoing county treasurer delivered to his successor two certified checks on a bank, which was a depository of county funds, held not a redeposit, and the liability of the bank on its depository bond continued. — Hall County v. Thomssen, Neb., 89 N. W. Rep. 393.

46. DOWER—Homestead.— Commissioners appointed to set out a homestead and admeasure dower may, under Rev. St. 1889, § 5440, determine the widow's dower by deducting the value of the homestead from one-third the value of the entire real estate. — Cassity v. Pound, Mo., 67 S. W. Rep. 283.

47. DOWER Release.— A widow, entitled to dower in land, who joins with the owner of the fee in a conveyance thereof, thereby releases her dower.—Campbell v. Wilson, Ill., 63 N. E. Rep. 103.

48. EMINENT DOMAIN — Compensation. — A railroad company, having condemned a right of way is estopped to abandon it, and is bound to pay the award to the landowner.- Brown v. Chicago, R. I. & P. R. Co., Neb., 89 N. W. Rep. 405.

49. EMINENT DOMAIN — Rights of Property Owners. — Deposits of money with county judge pending condemnation proceedings does not, unless withdrawn by the property owner, discharge the obligation of the company to make compensation. — Brown v. Chicago, R. I. & P. R. Co., Neb., 89 N W. Rep. 405.

50. EMINENT DOMAIN — Riparian Rights. — Riparian rights are property, within Bill of Rights, § 19, of which the owner cannot be deprived without due compensation, though taken for a public use. — City of Mansfield v. Balliett, Ohio, 63 N. E. Rep. 86.

51. EQUITY Mining Royalties. — In a suit to enforce a lien for mining royalties, the court held to have jurisdiction to adjudicate the question of lien and render a personal decree for the amount found due. — Hewitt Iron Min. Co. v. Dessau Co., Mich., 89 N. W. Rep. 365.

52 EVIDENCE - Account Books.—The admission of account books in evidence, where certain items were charged by clerks out of the jurisdiction of the court, held not error. — Cameron Lumber Co. v. Somerville, Mich., 89 N. W. Rep 346.

53. EVIDENCE— Expert Testimony. — An expert may give an opinion as to sufficiency of a particular appliance, based on his own knowledge, without requiring the attorneys to describe a hypothetical machine to him. — Kaminski v. Tudor Iron Works, Mo , 67 S. W. Rep. 221

54. EVIDENCE — Parol Agreement. — In an action for breach of a contract for the sale of land on terms plainly set forth therein, it was not error to refuse evidence of a parol agreement. — Walker v. Mack, Mich., 89 N. W. Rep. 338.

55. EVIDENCE—Value of Time. — In an action for personal injury by one who had no regular occupation or salary, it is error to permit him to testify to the "fair and reasonable value of his time" during the first year

after he was injured. — Whipple v. Rich, Mass., 63 N. E Rep. 5.

56. EVIDENCE - Proof of Probate. — A copy of an order probating a will, certified by the clerk of the county court, held to show presumptively a probate by a court having jurisdiction. — Yarbrough v. De Martin, Tex., 66 S. W. Rep. 177.

57. EVIDENDE — Res Gestæ. — Declarations of the engineer of the train, made several hours after the injury to employee of railroad, held not admissible against the master, not being a part of the *res gestæ*. — Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Admr., Ky., 67 S. W. Rep 383.

58. EVIDENCE— Testimony of Expert Nurses. — In an action against the estate of a decedent to recover on a *quantum meruit* for services as body servant and nurse, testimony of expert nurses present as to value of plaintiff's services held properly admitted. — Ryans v. Hospes, Mo., 67 S. W. Rep. 285.

59. EVIDENCE Value of Land. — In proving value of land at a particular time, a witness cannot show what he was then authorized to bid for the land. — First Nat. Bank v. Hackett, Neb., 89 N. W. Rep. 412.

60. EXECUTION—Cemeteries. — That an owner of the legal title to lots in a cemetery receives a portion of the revenue on a sale thereof for burial purposes does not render the unsold lots subject to execution. - First Nat. Bank v. Hazel, Neb., 89 N. W. Rep. 378.

61. EXECUTION—Voidable.— An execution issued contrary to Ky. St. § 1656, may be set aside by the defendant, but until he does so a sale made thereunder is not void.- Mitchell v. Fidelity Trust & Safety Vault Co., Ky., 67 S. W. Rep. 263.

62. EXECUTORS AND ADMINISTRATORS — Claims Against ,Decedent. — Notes and checks found among effects of decedent held admissible to disprove claim based on a note not in claimant's possession. — Taylor v. Greene, Mich., 89 N. W. Rep. 343.

63. EXECUTORS AND ADMINISTRATORS — Limitations.— A claim by an executor against the estate is not subject to or barred by Pub. St. ch. 136, § 9, providing that executors shall not be held to answer any suit by a creditor unless commenced within two years of the giving of the executor's bond.—Brown v. Greene, Mass., 63 N. E. Rep. 2.

64. EXECUTORS AND ADMINISTRATORS — Sale of Real Estate.- Under Rev. St. 1899, § 45, when a will directs the sale of real estate to pay debts by the executor, with the advice and consent of the daughter and son, and the son dies before a sale, it may be made with the consent of the daughter, and without order of the probate court. — Wisker v. Rische, Mo., 67 S. W. Rep. 218.

65. FERRIES — Riparian Owners. — Question whether representation of right to operate ferry, inducing payment of money for its relinquishment, was a fraudulent statement of fact, or mere opinion, held for the jury.— Tuscaloosa County v Foster, Ala., 31 South. Rep 587.

66. FRAUDULENT CONVEYANCES—Conveyance to Wife While Indebted on a Note. - Where a husband, indebted on a note to plaintiff, conveyed land, which was his only property, to his wife, under an agreement that after his death she pay a certain sum to each of his children by a former marriage, the conveyance was void as to plaintiff.—Needles v. Ford, Mo., 67 S. W. Rep. 240.

67. FRAUDULENT CONVEYANCES—Right of Wife to Hold Land Fraudulently Obtained.—Where a husband procured land by fraud toward complainants, and afterwards married and conveyed the land to his wife, she was not entitled to hold the land against them —Hambiet v. Harrison, Miss., 31 South. Rep. 580.

68. GARNISHMENT - Claim by Third Person.—Plaintiff, under issues framed as provided by Code, § 4142, on claim by third person to attached property, may, without special plea, show matter of estoppel in rebuttal.— Louisville & N. R. Co. v. Sharp, Ala., 31 South. Rep. 609.

69. GUARDIAN AND WARD—Accounting Held Conclusive.—Judgment against guardian on accounting held conclusive against sureties, though they had no notice of hearing.—Rice v. Wilson, Mich., 89 N. W. Rep. 336.

70. HOMESTEAD—Waiver of Right.—The right of homestead held waived, unless asserted before a sale on foreclosure.- Curtis v. D. M. Osborne & Co., Neb., 89 N. W Rep. 420.

71. HOMICIDE—Inquisition in Lunacy.—That an inquisition in lunacy was pending for 10 years did not invalidate the judgment.—Hunt v. Searcy, Mo., 67 S. W. Rep 206.

72. HUSBAND AND WIFE - Wife's Separate Property. - A husband, who joined in a mortgage of his wife's land and had notice of a proceeding to sell it to pay the mortgage debt after her death intestate, is precluded from afterwards claiming that the probate court had no jurisdiction to sell all the land mortgaged, notwithstanding Burns' Rev. St. 1894, § 2642. - Pearson v. Kepner, Ind , 63 N. E. Rep. 38.

73 INDEMNITY Construction —A surety on a bond given to indemnify one of several sureties on a replevin bond cannot, against the terms of his obligation, be held to indemnify co-sureties of the indemnified surety — American Surety Co. v. Boyle, Ohio, 63 N. W. Rep. 73.

74. INJUNCTION—Attorney's Fees.—In an action on an injunction bond to recover attorney's fees, it must be shown that injunction was the only relief sought, or that the fees were paid solely to procure its dissolution.—First Nat. Bank v. Hackett, Neb., 89 N. W Rep. 412.

75. INSANE PERSONS—Parent's Liability for Board. - Under Ky. St. § 257, a parent is not liable for the board of an adult child in a state insane asylum. — Central Kentucky Asylum for the Insane v. Knighton, Ky., 67 S. W. Rep. 366.

76 INSPECTION Gasoline.—Under Ky. St. § 2202, gasoline, being an oil which may be used for illuminating purposes, is subject to inspection, and one who sends such oil into the state for sale is liable for the inspector's fees.—Burkhardt's Admr. v. Striger, Ky., 67 S. W. Rep. 270.

77. INSURANCE—Action on Policy. - In an action on a fire insurance policy, the party named in it as beneficiary is properly joined with the insured as plaintiff. - McClelland v. Greenwich Ins. Co., La., 31 South. Rep. 691.

78. INSURANCE - Action on Premium Note.—A member of a mutual insurance company cannot defend an action on a premium note on the ground that he was not required to furnish a surety, as provided by the rules of the company.—Randall v. Phelps County Mut. Hail Ins. Assn., Neb., 89 N. W. Rep. 398.

79. INSURANCE - Conditions of Policy. - Officer of company, empowered to waive a condition forbidding additional insurance, may do so by indorsement on the policy. - Nebraska Mercantile Mut. Ins. Co. v. Sasek, Neb., 89 N. W. Rep. 428.

80. INSURANCE—Husband as Beneficiary. - A demurrer to the evidence, in a suit on a life policy on the life of a married woman for the benefit of the husband, held not to raise the question of the husband's right to be a beneficiary. - Kern v. Supreme Council, American Legion of Honor, Mo., 67 S. W. Rep. 252.

81. INSURANCE—Immediate Notice.—A requirement of immediate notice of accident, contained in an employers' liability policy, is of the essence of the contract.—Employers' Liability Assur. Corp. v. Light, Heat & Power Co., Ind , 63 N. E. Rep. 54.

82. INSURANCE - Iron-Safe Clause —Iron-safe clause in fire policy, as to keeping complete record of purchases, sales, etc., of stock covered, held breached where the cash book was negligently left out and destroyed in the fire. Fire Assn. of Philadelphia v. Calhoun, Tex., 67 S. W. Rep. 153.

83. INSURANCE - Warranty.—The trivial illness of insured on the day on which he received his life policy, though he never recovered therefrom, held not a defense to an action on the policy, which required him to

be in good health on such day.—Woodmen of the World v. Locklin, Tex., 67 S. W. Rep. 331.

84. INTERNAL REVENUE—Appraisal on Mortgage Foreclosure.—Under War Revenue Act 1898, a revenue stamp is not required to the certificate of appraisal made by a sheriff in the execution of a decree for sale on foreclosure.—Noble v. Citizens' Bank, Neb., 89 N. W. Rep. 400.

85. INTOXICATING LIQUORS—Local Option.—Where a parish which has voted for prohibition fails within 12 months from repeating such vote, a city or town within it can take action to emancipate itself from the restraint put upon it by such election.—Police Jury of Parish of Avoyelles v. Corporation of Mansura, La., 31 South. Rep. 650.

86. JUDGES—Election Cases.—One who was elected special judge to try contested election cases, after he had determined not to try them, should have vacated the bench, and allowed some other person to be elected to hear and determine the cases.—Terry v. Baker, Ky., 67 S. W. Rep. 258.

87. JUDGMENT—Decretal Sale.—In an action to sell real estate for reinvestment, the court had jurisdiction to adjudge that the purchaser at decretal sale had fully discharged his sale bonds, and that judgment, not having been vacated or reversed, is a conclusive determination of that question.—Reed v. Bryant, Ky., 67 S. W. Rep. 42.

88. JUDGMENT—Motion to Set Aside.—A motion to set aside a default judgment in a suit on a vendor's lien note, because of the discovery of evidence as to defect of title, is in effect a motion for a new trial, and must be tested by the rules applicable thereto.—Fitzgerald v. Compton, Tex., 67 S. W. Rep. 131.

89. JUDGMENT—Negotiable Note.—Possession of a negotiable note held *prima facie* proof of ownership, which is not rebutted by a finding in a former action before the note was due that it was the property of another.—Ryan v. West, Neb., 89 N. W. Rep. 416.

90. JUDICIAL SALES—Error in Judgment.—An error in a judgment for the sale of land is not ground for setting aside the sale made thereunder; and therefore, where no other ground is relied on, a judgment confirming the sale will be affirmed, though the judgment under which the sale was made be reversed.—Talbott v. Campbell, Ky., 67 S. W. Rep 53.

91. JURY—Omission in Verdict.—Where the jury are directed, if they find for plaintiff, to authorize foreclosure of a lien, and they omit from their verdict any reference to the lien, the court cannot enter judgment foreclosing the lien.—Ablowich v. Greenville Nat Bank, Tex., 67 S. W. Rep. 79.

92. JUSTICES OF THE PEACE—Attachment.—A decision by a justice on trial of right to property in attachment is a final decision, within Code Civ. Proc. § 580, allowing a review of a final order made by a justice.—McCormick Harvesting Mach. Co. v. Scott, Neb., 89 N. W. Rep. 410.

93. JUSTICES OF THE PEACE—Evidence.—Overruling objection in circuit court to introduction of evidence under pleadings in action begun before a justice held harmless. Chicago Bldg. & Mfg. Co. v. Yell, Mich., 89 N. W. Rep. 329.

94. JUSTICES OF THE PEACE—Jurisdiction First Raised on Appeal. Objection that the circuit court, and not a justice of the peace, had jurisdiction, made for the first time in the supreme court, held too late; there having, on appeal from the justice, been a trial in the circuit court.—Rambsy v. Bigler, Mich., 89 N. W. Rep. 344.

95. JUSTICES OF THE PEACE—Motion to Set Aside Part of Judgment.—The action of a justice in granting a motion to set aside a part of the judgment held to set the entire judgment aside.—Walker v. Mears, Tex., 67 S. W. Rep. 167.

96. LARCENY—Evidence.—Admission of prosecutor's testimony that accused, while under arrest, handed him the money stolen, held not error.—Brown v. State, Tex., 67 S. W. Rep. 112.

97. LARCENY—Instruction.—Instruction as to the effect of accused's ownership or supposed ownership of the property alleged to have been stolen held improperly refused in a prosecution for the theft of a beef.—Steed v. State, Tex., 67 S. W. Rep. 328.

98. LARCENY—Reasonable Doubt.—Upon a prosecution for theft, if the jury have a reasonable doubt as to whether defendant believed he had a right to take the property, they must acquit.—Reese v. State, Tex., 67 S. W. Rep. 325.

99. LIBEL AND SLANDER—Repeating Slanderous Words. It was error in a slander case to instruct that the jury might give nominal damages only, if they believed that defendant did not originate the slander, but without malice merely repeated it, and that plaintiff was in no manner injured thereby.—Nicholson v. Merritt, Ky., 67 S. W. Rep. 5.

100. LICENSES—Construction of Ordinance.—Where the object of a city in adopting an ordinance for an occupation tax was to raise revenue, then the money exacted is a tax, and belongs to the city.—State v. Boyd, Neb., 89 N. W. Rep 417.

101. LIMITATION OF ACTIONS—Notice of Fraud.—The recording of a fraudulent deed held not sufficient to charge all parties with notice of the fraud, so as to start running of limitations.—Forsyth v. Easterday, Neb., 89 N. W. Rep. 407.

102. LOGS AND LOGGING—Time of Filing Lien.—Lien for work on logs, filed within 30 days of last work, held good for work before the last three months; the latter having been paid.—Hammond v. Pullman, Mich., 89 N. W. Rep. 358.

103. MANDAMUS—Refusal to Try a Case.—A *mandamus* will not be granted by the court of appeals to compel a special judge to try a case, where the term for which he was elected is about to expire.—Terry v. Baker, Ky., 67 S. W. Rep. 258.

104. MANDAMUS—Warden of Penitentiary.—Where the warden of a penitentiary refused to allow the sheriff to remove certain personalty under order of replevin, or to make proper service, *mandamus* will lie to compel him to permit the same.—Hopkins v. State, Neb., 89 N. W. Rep. 401.

105. MASTER AND SERVANT—Assumption of Risk.—The issue as to whether a railroad employee assumed the risk of defective appliances which resulted in his injury can be raised only by a special plea.—International & G. N. R. Co. v. Harris, Tex., 67 S. W. Rep. 315.

106. MASTER AND SERVANT—Negligence in Backing Train.—Whether an engineer was guilty of negligence in backing his train without a knowledge of the whereabouts of a brakeman, who had gone back to uncouple a car, was for the jury.—Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Admr., Ky., 67 S. W. Rep. 383.

107. MASTER AND SERVANT—Negligence of Driver.—The owner of a team held not liable for injury to a boy thrown therefrom by negligence of the driver.—Mahler v. Scott, Mich., 89 N. W. Rep. 340.

108. MASTER AND SERVANT—Notice of Danger.—Though the specific warning in regard to machinery used would not absolve a servant from responsibility when, with ordinary intelligence, he could have known the same, whether he did so is a question for the jury.—Gray v. Commutator Co., Minn., 89 N. W. Rep. 322.

109. MASTER AND SERVANT—Self Appliances.—The master's duty in respect to safe machinery extends to such risks as the master ought to know in the exercise of due diligence.—Gray v. Commutator Co., Minn., 89 N. W. Rep. 322.

110. MASTER AND SERVANT—Employment for Period While Services are Satisfactory.—Where a contract for the re-employment of a spare brakeman is "for such time as his services and conduct shall be satisfactory to the officers of the railroad company in whose department he may be employed," and he is under no obligations to accept or remain in such employment, if offered, a discharge contrary to the terms of the contract would entitle the employee to only nominal damages

— Sax v. Detroit, G. H. & M. Ry. Co., Mich., 89 N. W. Rep. 368.

111. MORTGAGES—Agreement Between Mortgagees. — Certificate of satisfaction of the decree of foreclosure, issued by the clerk on his own motion, held not to cancel first mortgage in favor of one who, with notice of an agreement between the mortgagees, takes a mortgage from the mortgage purchaser at foreclosure sale. —Ryan v. West, Neb., 89 N. W. Rep. 416.

112. MORTGAGES— Appraisal. — There is no presumption that an appraisement is unfair because an appraiser who knew the land well did not go upon it on the day of the appraisement.—Iowa Loan & Trust Co. v. Devall's Estate, Neb., 89 N. W. Rep. 381.

113. MORTGAGES—Deficiency Judgment.—Civ. Proc., commonly known as "Deficiency Judgment Act," does not affect plaintiff's right to a deficiency judgment on a cause of action accruing prior to and existing at the time of such repeal. — Merrill v. Miller, Neb., 89 N. W. Rep 606.

114. MORTGAGES — Penalty for Refusing to Discharge Mortgage. — Rev. St. 1898, § 2256, does not authorize imposition of penalty for refusing to discharge mortgage, where mortgagee or his assignee acts in good faith.— Schumacher v. Falter, Wis., 89 N. W. Rep. 486.

115. MORTGAGES—Return of Sheriff. — Failure of sheriff to return order of sale under decree of foreclosure within 60 days is no ground for withholding confirmation of the sale. — Taylor v. Reis, Neb., 89 N. W. Rep. 374.

116. MORTGAGES— Setting Aside Appraisement.— Appraisement on foreclosure will not be set aside, unless the evidence shows such a discrepancy between the actual and the appraised value as to raise a presumption of fraud.— Jones v. Cleary, Neb., 89 N. W. Rep 386.

117. MUNICIPAL CORPORATIONS — Barbed Wire Nuisance.—A barbed wire stretched across a street to prevent travel on a part of the street undergoing repairs is a nuisance, and the city is liable for an injury caused thereby.—City of Glasgow v. Gillenwaters, Ky., 67 S. W. Rep. 381.

118. MUNICIPAL CORPORATIONS—Construction of Side walk.—An ordinance requiring a lot owner to build a sidewalk within five days from notice, and, on his failing to do so, imposing a tax on him for the cost, held void for unreasonableness. — Auditor General v. Hoffman, Mich., 89 N. W. Rep. 348.

119. MUNICIPAL CORPORATIONS— Contributory Negligence.—A pedestrian is not chargeable with contributory negligence in unnecessarily leaving the sidewalk to cross a street at any point. — City of Glasgow v. Gillenwaters, Ky., 67 S. W. Rep. 381.

120. MUNICIPAL CORPORATIONS — Discharging Explosives. — A city is liable for injury to property resulting from the discharge of explosives by a disorderly crowd celebrating Christmas. — City of Madison v. Bishop, Ky., 67 S. W. Rep. 269.

121. MUNICIPAL CORPORATIONS— Impressing Horses.— A city held not liable for the action of its police officers in impressing horses to be used in removing the dead, etc., after a destructive fire.—City of Galveston v. Brown, Tex., 67 S. W. Rep. 156.

122. MUNICIPAL CORPORATIONS — Municipal Improvement.—Where one of two partners signs a petition for a municipal improvement, and the other does not, one-half the value of the partnership property should be added in finding the total value of the property of the petitioner. — Earle v. Board of Improvement of City of Morrilton, Ark., 67 S. W. Rep. 312.

123. MUNICIPAL CORPORATIONS—Official Bond.—An excess in the deposits of the secretary of a village water board for his collections for the first four months of the period covered by his official bond should be credited to collections made prior to that time in determining liabilities on such bond. — Village of Laurium v. Mills, Mich., 89 N. W. Rep. 362.

124. MUNICIPAL CORPORATIONS — Pollution of Water Course.—Where a municipal corporation, without a legal appropriation, causes its sewage to be emptied into a natural water course, thereby creating a nuisance, it is liable to an action by a riparian owner for the damages so sustained.—City of Mansfield v. Balliett, Ohio, 63 N. E. Rep. 86.

125. MUNICIPAL CORPORATIONS — Public Market. — Where the charter of a town gives it the right to establish public markets, it has legal authority to enact reasonable ordinances requiring articles of food to be vended in such market house only. — Town of Crowley v. Ruckner, La., 31 South. Rep. 629

126. MUNICIPAL CORPORATIONS— Street Crossing Railroad. — Where a city council have decided to extend a street across a railroad, the court cannot interfere on the ground that there is no necessity for such extension, unless an extreme case of oppression or outrage is shown.—Chicago & N. W. Ry. Co. v. City of Morrison, Ill., 63 N. E. Rep. 96.

127. MUNICIPAL CORPORATIONS — Unlawful Arrest. — Ordinance authorizing arrest without warrant regardless of charges being made by citizens held unauthorized by charter. — Gambill v. Schmuck, Ala., 31 South. Rep. 604.

128. MUNICIPAL CORPORATIONS — Water and Light Plant.—Power of a city council to purchase a water and light plant cannot pe implied from a charter provision authorizingthe council to "erect, construct, build, operate, and maintain" such a plant, where the charter prescribed a certain plan of construction therefor. City of Austin v. McCall, Tex., 67 S. W. Rep. 192.

129. NAMES — Suffix Sr. and Jr. as Part of Name.—An instruction that, if a father adopted the suffix "Sr." to distinguish himself from his son, the law presented a deed of property owned by the father, executed without the suffix, to be the deed of the son, was incorrect, because the suffix "Sr." is no part of a name. — Hunt v. Searcy, Mo., 67 S. W Rep. 206.

130. NEGLIGENCE Failure to Prove Gross Negligence. —The fact that plaintiff alleged gross negligence did not preclude him from recovering upon proof of ordinary negligence, as there was merely a failure to prove a part of his allegation.—Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Admr., Ky., 67 S. W. Rep. 383.

131. NEW TRIAL—Amendment of Motion.—A motion for a new trial cannot be amended, after statutory time for filing such motion has expired, unless party was unavoidably delayed.—Gullion v. Traver, Neb., 89 N. W. Rep. 404.

132. NEW TRIAL—Jurors Impeaching Verdict. The affidavits of jurors held inadmissible to impeach the verdict. Griffith v. Mosley, Ark., 67 S. W. Rep. 309.

133. NEW TRIAL—Testimony of New Witness.—A new trial will not be granted on account of the discovery of a single witness on a point not conclusive of the controversy.—Oberdorfer v. Newberger, Ky., 67 S. W. Rep. 267.

134. NOTARIES Notice of Dishonor.—Giving notice of dishonor of protested paper is, in the absence of contrary instructions, the official duty of a notary, for neglect of which an action will lie on his official bond.— Dartmouth Sav. Bank v. Foley, Neb., 89 N. W Rep. 395.

135. OFFICERS—Appointees of One Not Entitled to Office.—That one who held the office of auditor under a certificate of election was adjudged not to be entitled to the office did not operate to remove an insurance commissioner appointed by him while in office pending the contest. — Sweeney v. Coulter, Ky., 67 S. W. Rep. 264.

136. OFFICERS—Bond.—The official bond of the secretary of a village water board held to cover an incumbency growing out of a holding over for a second term without a reappointment.—Village of Laurium v. Mills, Mich., 89 N. W. Rep. 352.

137. PARTITION—Burden of Proof of Title.—In a partition suit brought by alleged heirs of decedent against the heir having possession of the property, the burden is on plaintiffs to prove their title; defendant's posses-

sion alone being sufficient to entitle him to judgmen otherwise.—Laferiere v. Richards, Tex., 67 S. W. Rep. 125

138. PARTNERSHIP—Admission of New Member.—Two firms are separate legal entities, though one has grown out of the other by the admission of a new member.—Newman v. Eldridge, La., 31 South. Rep. 688.

139. PAYMENT—Receipt in Full.—A "receipt in full" is not conclusive that nothing more is due, but may be shown to be erroneous.—Illinois Cent. R. Co. v. Manion, Ky., 67 S. W. Rep. 40.

140. PHYSICIANS AND SURGEONS—Injury to Business.—The professional practice of a physician is a "business," within St. 1895, ch. 488, § 14, allowing compensation to any one owning an established "business" which is injured by the carrying out of the provisions of the act.—Earle v. Commonwealth, Mass., 63 N. E. Rep. 10.

141. PLEADING—Petition Attacked After Judgment.—A petition will be construed, when attached for the first time after judgement.—Chambers v. Barker, Neb., 89 N. W. Rep. 388.

142. PRINCIPAL AND AGENT—Unauthorized Warranty.—An agent who has been held personally liable upon an unauthorized warranty made by him cannot look to the principal to reimburse him.—J. I. Case Threshing Mach. Co. v. Gardner, Ky., 67 S. W. Rep. 367.

143. PUBLIC LANDS—Powers of State.—The state can make a cut-off connecting a bayou which is not navigable with other waters, though one has squatted upon the land owned by the state and fronting on such bayou.—Bendich v. Scobel, La., 31 South. Rep. 703.

144. PUBLIC LANDS—Reclamation—Act Feb. 8, 1860, purporting to create a county, and subsequent acts recognizing such county as existing, held not to estop the state from reclaiming lands patented under Const. art. 7, § 6, and Act April 7, 1883, to such county.—Cameron's Exrs. v. State, Tex., 67 S. W. Rep. 348.

145. PUBLIC LANDS—Title.—Under Ky. St. § 4683, one who has entered and surveyed vacant land without notice to an actual settler who had previously surveyed it obtains an inferior title.—Slusher v. Simpson, Ky., 67 S. W. Rep. 280.

146. QUIETING TITLE—Bill in Equity.—Where a purchaser at foreclosure sale has a perfect title as against a subsequent deed, such a deed is not a cloud on title for the cancellation of which a bill will lie.—Tait v. American Freehold Land Mortg. Co., Ala., 31 South. Rep. 623.

147. RAILROADS—Fire Caused by Sparks.—*Prima facie* case, made by proof that fire was set by sparks from defendant's locomotive, requires defendant only to meet it, and not to show by preponderance that it was not negligent.—Gulf, C. & S. F. Ry. Co. v. Johnson, Tex., 67 S. W. Rep. 182.

148. RAILROADS—Killing Stock.—One whose cow is killed on a railroad track, not near a crossing station or village, has the burden of showing the company was negligent—Kansas City, M. & B. R. Co. v. Henson, Ala., 31 South. Rep. 590.

149. RECEIVERS—Notice of Application.—On application for appointment of receiver, the parties "to be affected thereby" to be notified under Code Civ. Proc, § 267, are those interested in the possession of the property and the disposition of the rents.—Chambers v. Barker, Neb., 89 N. W. Rep. 388.

150. REMOVAL OF CAUSES Federal Courts.—Where a non-resident corporation and its resident servant are properly joined as defendants, the non-resident defendant is not entitled to have the cause removed to the federal court. Cincinnati, N. O & T. P. Ry. Co. v. Cook's Admr., Ky., 67 S. W. Rep. 383.

151. REPLEVIN—Scope of Affidavit.—Affidavit to petition in replevin, stating that all the matters in the petition are true, will be treated as containing the statement in the petition.—Keim v. Vette, Mo., 67 S. W. Rep. 223.

152. REVERSIONS—Married Women.—Where a married woman seeks to replevin property, instructions dealing with the rights of married women as to personal property were applicable to the issues.—Bonawitz v. De Kalb, Neb., 89 N. W. Rep. 379.

153. SALES—Opportunity to Inspect.—The buyer of a number of wooden tables, having accepted them after opportunity to inspect, cannot claim that they did not conform to the contract.—Albin Co. v. Kentucky Table Co., Ky., 67 S. W. Rep. 13.

154. SALES—Recoupment in Actions for Price.—In an action by the vendor of a harvesting machine to recover the price, vendee held not entitled to recoup as damages injury to his grain because not harvested in time.—Warder, Bushnell & Glessner Co. v. Myers, Neb., 89 N. W. Rep. 387.

155. SEQUESTRATION—Liability for Rents Received.—A plaintiff, wrongfully procuring the possession of real estate by sequestration, and giving bond as required by Rev. St. § 4880, is liable to account for the rents actually received, and it is error to limit the damages to the rental value of the land.—Taylor v. Flynt, Tex., 67 S. W. Rep. 347.

156. STATUTES—Construction.—An act of the general assembly must be held constitutional, unless its repugnance to the organic act is reasonably certain.—Grinage v. Times Pub. Co, La., 31 South. Rep. 682.

157. STATUTES—Quieting Title.—Rev. St. 1889, § 2092, the only statute prior to Act March 15, 1897, relative to quieting title, held repealed by the latter, "it taking the place of statutes which failed in their objects."—Meriweather v Love, Mo., 67 S. W. Rep. 250.

158. STIPULATIONS—Action on Contract.—An agreement of counsel, subject to different construction, will not be enforced on a disagreement regarding its scope.—Lombard v. Citizens' Bank, La., 31 South. Rep. 654.

159. STREET RAILROADS—Failure to Look and Listen.—An instruction, in an action for death by collision with a street car, which did not declare failure to look and listen negligence alone, but coupled it with a duty to use ordinary care, was not erroneous for failing to add that only if by looking and listening decedent could have avoided the injury, failure to do so would preclude recovery.—Guinney v. Southern Electric R. Co., Mo., 67 S. W. Rep. 296.

160. STREET RAILROADS—Negligence.—The negligence of the driver of a hose cart, which collided with a street car, held not to preclude a recovery against the street car company by a fireman on the cart, who was injured in the collision.—Birmingham Ry. & Electric Co. v. Baker, Ala., 31 South. Rep 618.

161. SUBROGATION—Debt Paid by Stranger.—A stranger, who paid off a debt to secure which lien notes were pledged, and took up the notes, was substituted to all the rights of the pledgee.—Gunn v. Orndorff, Ky., 67 S. W. Rep. 372.

162. TAXATION—Board of Equalization.—Rev. St. §§ 2811, 2812, create a board of equalization, and such board cannot act as a board of appraisers and increase the aggregate value of the railroads of the state for purposes of taxation in excess of that returned by the county auditors.—State v. Annual State Board of Equalization of Railroads, Ohio, 63 N. E. Rep. 68.

163. TAXATION—Choses in Action—Under Comp. Laws, §§ 3836, 3837, subd. 6, the choses in action of a non-resident are not taxable in the state, though under the exclusive control of a resident agent.—Baars v. City of Grand Rapids, Mich., 89 N. W. Rep. 328.

164. TAXATION—Delinquent Taxes.—The appointment of a collector can be authorized only for the collection of any part of the delinquent list which has been publicly read as provided by Rev. St. § 2858. Board of Comrs. of Hamilton County v. Arnold, Ohio, 63 N. E. Rep. 81.

165. TAXATION—Property in Indivision. Where title to real estate is vested in two persons, who hold in indivision, the whole property may be assessed to both, without specification as to their respective interests.—

Howcott v. City of New Orleans, La., 31 South. Rep. 668.

166. TAXATION—Property Lists.—The tax lists required to be furnished to the assessor by property owners are not binding upon the assessor, and he may either raise or lower the valuations therein contained.—Bowman v. Montcalm Circuit Judge, Mich., 89 N. W. Rep 334.

167. TAXATION—Setting Aside Tax Sale. Const. 1898, art. 233, held a statute of repose, and after three years a party in possession under a duly recorded tax title cannot be disturbed, except for the causes mentioned in such article.—Canter v. Williams' Heirs', La., 31 South. Rep. 627.

168. TAXATION—Standing Timber.—Under Code, §§ 3753, 3774, 3759, timber owned by a lumber company and standing on land owned by third persons is separately assessable against the company.—Fox v. Pearl River Lumber Co., Miss., 31 South. Rep. 583.

169. TAXATION—Taxes Paid at Void Sale. The purchaser of real estate at a municipal tax sale, which is void because held at the wrong time, is entitled to recover the taxes paid from the owner of the property, and to have such taxes decreed a charge on the land until the payment thereof.—O'Flinn v. McInnis, Miss., 31 South. Rep. 584.

170. TAXATION — Tax Sale.—Delay of purchaser at tax sale in paying to the treasurer the taxes and costs, owing to the inability of the treasurer to accept payment at an earlier date, held not to invalidate the sale.—Leavitt v. S. D. Mercer Co., Neb., 89 N. W. Rep 226.

171. TAXATION — Tax Sale Certificate.—In foreclosure on a tax sale certificate and for prior and subsequent taxes paid, the certificate and receipts of the proper officer are *prima facie* evidence of the validity of the taxes.—Ryan v. West, Neb., 89 N. W. Rep. 416.

172. TELEGRAPHS AND TELEPHONES—Mental Anguish.—Complaint in an action against a telegraph company held to sound in tort, and not in contract, and hence not to support a claim of damages for mental anguish — Western Union Tel. Co. v. Krichbaum, Ala., 31 South. Rep. 607.

173. THEATERS AND SHOWS — Collection of License.—Acts 1898, No. 171, does not authorize a license tax, where the owner of an opera house does not himself participate in the occupation carried on by his lessees.—State v. French Opera Assn, La., 31 South. Rep. 630.

174. TRESPASS—Damages.—Damages for trespass will not include traveling expenses, loss of time, or attorney's fees incurred for prosecutions instigated against the trespasser.—Bendict v. Scobel, La., 31 South. Rep. 703.

175. TRESPASS—Payment of Taxes —In trespass, a village held not precluded from insisting that plaintiff's entry was an invasion of its rights of actual possession by receipt of its collector of taxes from him. Moore v. Pear, Mich., 89 N. W Rep. 347.

176. TRADE MARKS AND TRADE-NAMES—Requisites of Indictment.—Under Rev. St. 1899, § 10,369, an information which charges defendant with selling a preparation with a fraudulent label, and setting up a copy of each label, but not stating what particular parts were imitations, is fatally defective. State v. Thierauf, Mo., 67 S. W. Rep. 292.

177 TRIAL Failure to Ask for Certain Instructions.—Where the contestants of a will did not ask any instruction on the subject of fraud or imposition, they cannot complain that no instruction was given on that subject.—Oberdorfer v. Newberger, Ky., 67 S. W. Rep. 267.

178. TRIAL—Failure to Object to Evidence.—Where a party makes no objection to the admission of testimony, it is too late afterwards to move its exclusion.—Roe v. Bank of Versailles, Mo., 67 S. W. Rep. 303.

179. TRIAL—Right of Judge to Enter Jury Room —A party consenting to the trial judge entering the jury room and privately instructing the jury cannot complain.—Griffith v. Mosley, Ark., 67 S. W Rep 309.

180. TRIAL Statement of the Issues.—A statement by the court of the contention of a party is not a charge on the facts.—Bryce v. Cayce, S. Car., 40 S. E. Rep. 948.

181. TRIAL. Testimony that is Partially Inadmissible. —Where a statement made by a witness is partially admissible and partially inadmissible, it is not error to admit it over an objection to the entire statement.—Rhodes Haverty Furniture Co. v. Henry, Tex., 67 S. W Rep. 340.

182. TURNPIKES AND TOLL ROADS—Negligence.—The fact that an accident occurring on a plank road would not have occurred if it had not been for snowdrifts or plaintiff driving on railway ties projecting into the road, held not to relieve plank road company from liability for injury from its neglect to keep the road in safe condition.—Monyhan v. Detroit & S. Plank Road Co., Mich., 89 N. W. Rep. 372.

183. VENDOR AND PURCHASER—Title by Prescription.—Where owners of real estate have been in possession without any adverse claim for more than 10 years, a tender of a conveyance by them held a tender of a title, which a purchaser must accept. Revol v. Stroudback, La., 31 South. Rep. 665.

184. VENDOR AND PURCHASER—Written Agreement to Sell Realty. Where a vendor signs a written agreement to sell realty, and the vendee accepts the same and goes into possession, there is a complete contract.—Chambers v. Barker, Neb., 89 N. W. Rep. 388.

185. VENUE—Specific Performance.—Under Code Civ. Proc. § 982, an action by a vendor of land to compel his vendee to accept the deed and pay the agreed price must be brought in the county where the land lies.—Turner v. Walker, 75 N. Y. Supp. 260.

186. WAREHOUSEMEN—Cold Storage.—It is not necessary, to recover against a cold storage company for damages, to prove more than that the goods, when delivered for storage, were, according to the usual test of commerce, sound.—Marks v. New Orleans Cold Storage Co., La., 31 South. Rep. 671.

187. WAREHOUSEMEN—Delivery. — Delivery is essential to give validity to warehouse receipts.—Roche v. Crigler, Ky., 67 S. W. Rep. 273.

188. WAREHOUSEMEN—Unpaid Storage. — Agreement, with no right to retain goods at end of month or to demand payment on removal reserved by the contract, creates no lien for unpaid storage.—Webster v. Keck, Neb., 89 N. W. Rep. 410.

189. WILLS—Contest.—A peremptory instruction to find for the contestees in a will contest held proper, where there was no direct evidence of mental incapacity or undue influence.—Davis v. Cox, Ky., 67 S. W. Rep. 261.

190. WILLS—Time of Appeal.—Under Code Civ. Proc. §§ 1722, 1723, as amended by Laws 1899, p. 146, limiting time for appeals in cases concerning the validity of wills to 60 days, an appeal taken January 5, 1900, from a judgment in such a case entered on April 8, 1899, will be dismissed.—*In re* Reily's Estate, Mont , 67 Pac. Rep. 1121.

191. WILLS—Undue Influence —If the execution of a will was procured by undue influence, it is immaterial when such influence was exerted.—Dunaway v. Smoot, Ky., 67 S. W. Rep. 62.

192. WILLS—Undue Influence.—Declarations of testator as to information given him by his daughter as to the habits of his sons, the contestants, would not have been competent as proof of the acts stated, but only to show the effect on his mind.—Oberdorfer v. Newberger, Ky., 67 S. W. Rep. 267.

193. WILLS—Undue Influence—A person who was the friend, housekeeper and nurse of a testator did not stand in any fiduciary relation to him, so as to create a suspicion of undue influence — Richardson v. Bly, Mass., 63 N. E. Rep. 3.

194. WITNESSES—Indictment Shown for Prior Thefts. —A defendant in a prosecution for theft, shown to have been indicted for other thefts before, may state the disposition of such cases, but cannot go into their details.—Stewart v. State, Tex., 67 S. W. Rep 107.